Public Utilities
FORTNIGHTLY

VOL. XVI; No. 12 DECEMBER 5, 1935

A New Court Procedure in Public Utility Rate Cases

As far as present knowledge goes, no effort to improve regulatory process in accordance with the Constitution holds greater promise, in the opinion of the author, than does the new District of Columbia Public Utilities Appeal Act, which he analyzes and discusses.

BY W. A. ROBERTS
PEOPLE'S COUNSEL, DISTRICT OF COLUMBIA

IN the summer issue of the *Harvard Business Review* published under the auspices of the School of Business Administration of Harvard University, Professor C. O. Ruggles is quoted as follows:

> There is much public interest at the present time in the rates, management, and regulation of public utilities. There is a widespread demand for rate reductions, and more recently there has been agitation for some plan of automatic adjustment of rates. This has come about in part because the public has grown suspicious of the efficiency and the integrity of highly centralized holding company management and because they believe that regulation has been ineffective.

While it is doubtful that the public generally believes that regulation of public utility corporations has been entirely ineffective, I must concede that there was ample occasion for public irritation in the protracted delays which for one cause or another have followed most efforts of public utilities commissions to reduce rates or to improve service.

About three years ago it became apparent that the system of review by the courts of public utility commission orders could be charged with much of the responsibility for the delay. A study was made of numerous

important rate cases in the District of Columbia and in other parts of the nation with the following results:

The valuation and rate case of the Capital Traction Company commenced in 1914 and was not terminated in so far as effect on rates was concerned until February 7, 1927, a period of twelve years, nine months, and seven days from the beginning of the public utilities commission's work.

THE rate case involving the Potomac Electric Power Company was in progress nine years, eleven months, and nineteen days before it was terminated by an agreement which has since become the famous "Washington plan of sliding scale."

In the state of Illinois, a telephone rate case affecting only a small part of the service which used coin boxes was commenced by a commission order entered in 1923. A decision of the Supreme Court of the United States was rendered on the principal subject matter on May 25, 1931, seven years, nine months, and ten days later, and it was the spring of 1933 before the final Supreme Court order was entered requiring a reduction in rates. There still remains unrefunded a large percentage of the amount of the public's money which was impounded during the litigation and considerable time will be required before it is all distributed.

Other cases which included no examination by public service commissions but which were initiated by municipal ordinances took similarly protracted periods of litigation. The famous Knoxville water case was not terminated until after seven years, six months, and twenty-two days had been consumed in litigation. The case of Smyth *v.* Ames, an outstanding land mark in utility litigation, was commenced by the Nebraska legislature and terminated by the Supreme Court decision five years, three months, and twenty-eight days thereafter.

THE numerous delays in addition to those cited as illustrations establish the fact that the appellate procedure must be fundamentally unsound. It is well known that economic conditions in the United States have changed radically in periods far less than five years. For example, the fixed plateau of prices generally recognized by the public and judicially confirmed by Mr. Justice Butler in the rate case involving the water service of Indianapolis was apparently established in 1928, but less than three years later even the most sanguine of the observing economists was prepared to concede that the bottom of price levels and industrial activity could not be accurately predicted. The phrase "prosperity is just around the corner" was so often proven false as to become a jest to the American people.

Now it is obvious that if economic changes can affect the rates and profits of public utilities as constitutionally determined and such changes can operate in periods of less than a single year, any system of judicial review which requires from three to five or more years can never satisfy the constitutional requirements and the continued use of such a system will have the effect of depriving the public of any practical control over the rates of the public utilities.

THE situation in the District of Columbia was aggravated by the statutory form of judicial review of commission decisions which was inaugurated at the time of creation of the public utilities commission in 1913. This type of review involves an exercise of the power of the legislature over the procedure of local courts and was somewhat similar to that in vogue in the state of Virginia which was construed in the famous Prentiss Case and held to be constitutional by the Supreme Court of the United States. Oklahoma also has a legislative type of review. In the District of Columbia Congress has in substance said to the supreme and appellate courts: in addition to your judicial duties you shall review orders of the public utilities commission, carefully study the record of the testimony before that commission, receive additional testimony if you see fit, and then substitute your judgment as to the correct decision for that of the public utilities commission even though your deliberation involves questions having no relation to the constitutional rights of the companies.

THE authority of Congress acting as a legislature for the District of Columbia to impose this duty upon the courts was sustained by the Supreme Court of the United States in the case of Keller *v.* Potomac Electric Power Company. Chief Justice Taft wrote the opinion in this cause and made it clear that the legislative powers of the court created by statute were in addition to the normal judicial function. As a result it was found that our local courts could review a valuation proceeding and order of the public utilities commission even though no change were made in rates or service requirements, but the Supreme Court of the United States declined to have imposed upon itself any such administrative duties.

IN summary, there was in the District of Columbia a type of review not required by the Federal Constitution but involving a reconsideration of every public utility question on its merits by the supreme court of the District of Columbia and again by the court of appeals of the District of Columbia. Any reasonably proficient public utility lawyer could without undue recourse to technicalities prevent an order of the public utilities commission from becoming operative for at least three and possibly five or six years.

As early as 1929 an effort was made by the public utilities commission to improve this procedure but the effort was in substance limited to a modification of the appeals statute which would have prevented the courts from reversing any finding of fact of the commission which was supported by evidence, that is to say, by any evidence regardless of the weight of preponderance of testimony

¶ "THE *case of Smyth v. Ames, an outstanding landmark in utility legislation, was commenced by the Nebraska legislature and terminated by the Supreme Court decision five years, three months, and twenty-eight days thereafter.*"

before the commission. This proposal was defeated before Congress and although renewed the following year met with little support.

It was quite apparent to me that the solution was not to be found in any simple restriction of the courts' legitimate constitutional prerogatives. Through the courtesy of the several state commissions and officials of state governments throughout the country there was collected early in 1931 a complete set of the statutes governing appeals from public utility commission orders and from the orders of other administrative commissions, both state and Federal. At the same time a very comprehensive review of the court decisions on the subject was made and the accumulated data were analyzed to afford a basis for a new statute which would be at once an improvement in procedure and obtain the utmost in expedition of administrative determinations without impairing the constitutional rights of the parties. The project was part of an effort to write an ideal public utility commission act covering all phases of regulation.

WHEN in 1933 the Federal Congress passed the Johnson Bill after a persistent campaign by the state public service commissions, the Federal courts which had been used in many instances by utility corporations to defeat the regulatory efforts of the state governmental bodies were in substance deprived of jurisdiction provided due process was afforded the public utility companies within the states. This legislation accentuated the demand for improvement in appellate processes in the state courts. The studies being made in the District of Columbia immediately took on increased importance and in that year there was introduced in both Houses of Congress a new Public Utilities Appeals Act for the District of Columbia which embodied the best advice then obtainable.

There were hearings and rehearings before both Houses but no final action and the 73rd Congress passed away with success as far removed apparently as it had been five years before. Before the 74th Congress convened in January, 1935, the bill was rewritten to embrace additional improvements and to meet the objections of the utility companies on the score of constitutionality. Protracted hearings were held by the Subcommittee of the House of Representatives under the leadership of Congressman Randolph Carpenter of Kansas.

The printed report of these hearings is of exceptional interest in that they reveal at least one congressional hearing at which all by-play and superfluous debate were eliminated and a definite effort made by both sides to get before Congress the administrative and constitutional arguments in support of the positions of the parties. At the conclusion of the hearings the Subcommittee reported the bill with minor amendments and it was passed by the House of Representatives in precisely the form desired by myself and by the other interested District officials.

INCIDENTALLY the bill had the support of practically all civic organizations and of the Bar Association of the District of Columbia as well as of the Federal Bar Association. In

Promising Simplification of Rate Cases

"REGARDLESS of the form of procedure which may be specified, public utility cases will always involve considerable time due to the vast sums of money and the natural complexities of the questions involved. . . . However, as far as present knowledge goes no effort to improve regulatory process in accordance with the Constitution holds greater promise than does H.R. 3462, the new District of Columbia Public Utilities Appeal Act."

the confusion of national legislation of stupendous importance the new measure attracted little public attention. However, it had attracted the attention of the utility lawyers and a concentrated campaign was made to prevent its passage by the United States Senate. Objections to the act as a whole were abandoned and the most skilful of the utility attorneys prepared briefs and arguments dealing with the constitutionality of the central provision of the act.

As the Appeals Act reached the Senate it provided that appeal should lie only from final orders of the public utilities commission and that there should be only one form of recourse to the courts, the procedure to be in accordance with the terms laid down in the bill. Once the commission's order was entered it was provided that within thirty days any person affected by the order might file with the commission an application in writing requesting reconsideration of the matters involved. It was further provided that this application for reconsideration must cite the specific errors relied upon. It then included this most important provision "that no public utility or other person shall in any court urge or rely on any ground not so set forth" in the petition for reconsideration.

This provision meant that the public utilities commission would have before it all of the claims upon which appeal to the courts would be had and would have the opportunity, which it must exercise within thirty days, to either grant or deny the application for reconsideration and, thereafter, if it saw fit, to hold further hearing or to rescind, modify, or affirm its decision. In other words, the law provided that within sixty days of the date of the order the issues must be clearly drawn and the public utilities commission, fully advised, must have determined to stand upon its decision or no court proceeding could ensue.

IT is most important to note that unless compliance with the reconsideration provision is had the parties may not appeal. All questions of surprise evidence which in the past had frequently been withheld from the commissions and presented for the

first time before the court are now eliminated and the eternal seesaw between court and commission which has consumed much of the time in the protracted litigation and discredited regulation is gone.

The new act provides that the supreme court of the District of Columbia shall have jurisdiction to hear appeals from any order of the commission except orders fixing or determining the value of the property of a public utility which are not combined with rate-making orders; that the appeal to the court must be filed within sixty days after the final action of the commission upon the petition for reconsideration and the commission must be given notice of the appeal simultaneously. Within twenty days the commission must file with the court the order upon which the appeal is based, its findings of fact and conclusions, and all of the testimony upon which the order was based. There is provision for the parties to reduce the size of this record, frequently extending to many thousands of pages, if they can agree on a condensed statement.

As the bill became law it also provided that the court shall hear no evidence but shall decide the case on the record before the commission and on the various petitions filed subsequent to the commission's order. If the court considers that the commission improperly refused to receive evidence it issues an order directing the commission to receive such evidence and to submit a finding of fact and conclusions of law based upon it. At any time during the trial before the court, the court may certify a question of law to the court of appeals, the court of last resort in the District of Columbia, and that court is required to hear arguments upon the question and to advise the lower court as to its decision. If the court of appeals sees fit to do so it may call before it the entire record in the supreme court and proceed to determine the case.

It will thus be seen that on each question of fact or law which can arise conceivably in the progress of appeal duplication has been eliminated and the advantage of the judgment of the commission with its specially trained personnel is constantly available to the court. When the judicial process is complete the supreme court can either dismiss the appeal and affirm the order of the commission or it can sustain the appeal thus making it necessary for the commission to enter a different order. However, the court may not as formerly draft its own order substituting its administrative judgment for that of the commission.

The almost unvaried practice in the past has been for a utility which objects to a decision of the commission, to file with the court a petition for a temporary injunction. Invariably the court has granted the petition and restrained the effect of the commission's order provided the utility stood ready to pay back amounts improperly collected and to set up an impounded fund or an adequate bond to assure this action.

In the drafting of the new Public Utilities Act a common-sense attitude was taken toward this historical truth and provision was made for staying a commission order only upon a *clear*

showing of the irreparable property loss alleged and provided the court required the preservation of records and accounts and adequate security for repayment of the loss to the public in the event the commission was sustained. It was the plain intention of Congress that this temporary relief should only be granted upon definite proof of a loss to the utility of substantial proportions.

It is to be noted that the new act makes no provision for so-called emergency orders. The term "emergency order" has been devised by some state legislatures at the request of public utilities commissions in order to accelerate the actual reduction in rates or improvement in service during the period while the usual cumbersome processes of regulation were operating. With the simplified methods embraced in the new law there should be no need of emergency orders and in any event it is a noteworthy fact that practically all of the efforts to adjust rates of utilities and declare a recess in the judicial review by the courts have failed.

We next come to the provision of the new act which bore the brunt of the attack of the utilities. It was fashioned upon the language included in the Radio Act of 1927 which was sustained by the Supreme Court of the United States in its decision in the Nelson Case, decided May 8, 1933. The committees of the House of Representatives had heard all of these arguments and had dismissed them in the light of the decision of the Supreme Court but before the Senate Committee Senator Millard E. Tydings of Maryland adopted the view that the specific language in question deprived the utilities of due process of law guaranteed by the Constitution. The clause to which particular objection was had read as follows:

> Par. 66. In the determination of any appeal from an order or decision of the commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall appear that such findings of the commission are arbitrary or capricious.

Senator Tydings took the position that even though there were substantial evidence to sustain the commission's finding of fact its order should be declared to be unlawful if the court considered the commission's finding unreasonable in the light of the other evidence of record. At the conclusion of this session before the Senate Committee, the committee adopted Senator Tydings' viewpoint and inserted the word "unreasonable" in addition to the words "arbitrary or capricious." However, it struck out the words "if supported by substantial evidence" so that in substance the commission

¶ "With *the simplified methods embraced in the new (District of Columbia) law there should be no need of emergency orders and in any event it is a noteworthy fact that practically all of the efforts to adjust rates of utilities and declare a recess in the judicial review by the courts have failed.*"

could issue an order whether or not there was substantial evidence and the findings of fact upon which the order was based would be sustained unless it was affirmatively shown by the utility that upon the record such findings were unreasonable, arbitrary, or capricious.

WHEN the bill with these two amendments reached the United States Senate, Senator Robert M. La Follette, Jr., took issue with the Senate amendments and a vote was had, the Senate sustaining Senator La Follette and returning the bill to the form in which it was passed by the House of Representatives. However, as in the case of most legislation for the District of Columbia, the matter was being considered under the unanimous consent rule and there was an objection to further consideration unless the Senate amendments were adopted. In the light of this objection Senator La Follette asked reconsideration and the bill was passed as it came from the Senate Committee.

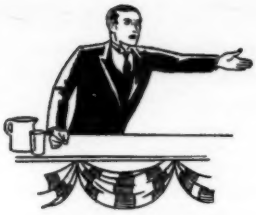
Unquestionably the bill would have been more satisfactory from the point of view of public authority without the amendments but the disadvantages are in a measure offset by the assurance on the part of the local public utilities that they would not question the validity of the remaining features of the bill if the amendments were carried. All told, the legislation is the conclusion of a serious and careful study of the question of judicial review of public utilities commission orders. It is in no sense theoretical but is founded solidly upon experience in numerous rate cases and in a jurisdiction which has experimented with dual legislative and judicial review.

REGARDLESS of the form of procedure which may be specified, public utility cases will always involve considerable time due to the vast sums of money and the natural complexities of the questions involved. A single attorney for a utilities commission may be engaged in two or more such cases at once and the limitations of physical capacity of counsel and of the courts will prevent greater speed than that which is possible under the new bill. It is axiomatic that there is no settled question in the field of government. As time passes and specific questions are considered it is entirely possible that improvements in the system of review will be devised. However, as far as present knowledge goes no effort to improve regulatory process in accordance with the Constitution holds greater promise than does H.R. 3462, the new District of Columbia Public Utilities Appeal Act.

The "Write-Down"

"Now, I tell you plainly that this great national debt of ours must be reduced. . . . We propose, my fellow-Canadians, to ask the people of this country who are the creditors of the Dominion Government, the Canadian National Railways, and of the Provinces and of the municipalities, to agree to a scheme of conversion upon a substantially lower rate of interest than that now provided for already on the conversions carried out by this government in the last five years."

—RICHARD B. BENNETT,
Former Canadian Prime Minister.



State Commissions Should Have Proper Publicity Departments

Cause of regulation injured by uninformed criticism

A utility commission's duty, in the opinion of the author, is as much to protect the honest utility from the unjust demands of the public as it is to protect the public against the unjust exactions of the public utility; and he believes that when this fact is admitted and the public is kept well informed as to the utility commissioners' work, then four fifths of commission troubles will disappear.

By HON. WILL M. MAUPIN
COMMISSIONER, NEBRASKA STATE RAILWAY COMMISSION

It may not be successfully denied that much of the agitation for government interference in the matter of state regulation of public utilities is due to the failure of state commissions to keep the rate-paying public informed. Newspaper reports of commission activities are often misleading and seldom informative. And one denial of a rate reduction receives a ton of adverse criticism as compared with an ounce of commendation when a rate decrease is authorized. It is unfortunate, but true, that the general public's conception of a public utility commission is a body of three or five commissioners elected on partisan tickets, sitting to protect the public utilities from the just demands of an exploited public. This conception may have had some excuse for existence in the not distant past, but it has none for existence now.

When the matter of regulating public utilities first came into being, it was born of the necessity for defending the public against the unrestricted greed of corporation managers. Those were the days of rebates, special favors, discrimination, and exorbitant rates. Naturally the unregulated corporations resented interference with their "rights and privileges," but no honestly conducted public utility today would consent to go back to the old régime. Regulation is a generally accepted fact, but there is every reason for the stockholders and managers of utilities of the country to object to a regulation that becomes, in effect, strangulation.

AN erroneous impression exists in the minds of too many—that the only function of a utility commission is to prevent the utilities from exploiting the public. The fact is, an honest utility commission's duty is as much to protect the honest public utility from the unjust demands of the public, as it is to protect the public against the unjust exactions of the public utility. When this fact is admitted by the general public, and the public is kept well informed as to the utility commission's work, then four fifths of commission troubles will disappear.

In my own state, Nebraska, the three railway commissioners are elected, one every two years, the term being of six years' duration. The commission came into being in 1907, the intent being to regulate the then unrestricted railroads. Little by little the work of the commission has been enlarged until now it is to all intents and purposes a state utility commission, having jurisdiction over all common carriers, and jurisdiction over the security issues of all public utilities of the state.

Naturally, being a "political job," the average candidate for a place on the commission starts out on his campaign, catering to that always existing majority of voters who believe that whatever is is wrong. He promises to "rip Hell" out of the public utilities, reduce rates, force extensions of service, cut the salaries of utility officials down to section-hand wages, etc., etc., and so on. When, and if, elected, he makes the astounding discovery that he cannot reduce rates on his own motion; that he sits in a judicial capacity and must make decisions according to the evidence; that commission decisions are subject to appeal to the courts; that utilities, as well as the public, have rights that must be respected and safeguarded, and that the public's demands are often unreasonable. The result is that when he gets settled in the harness and is unable to carry out his campaign promises, the unreasoning element of the public immediately charges him with having become the "tool of the utilities" he once denounced.

I SEE but two ways to correct this unfortunate situation. One is for the utility commissioners to educate the public as to the real duties and accomplishments of the commissions, and that may easily be accomplished by each commission establishing a "public relations" or publicity department, avoiding all semblance of political propaganda.

The other method is by a careful study of a certain pioneer politician whose name was Absalom. It will be recalled by those who have read the Book of Books, and I hope more people read it in the future than have read it in the past, that Absalom, son of David, cherished the ambition to dethrone his father and become king himself. In pursuance of this ambition he set a pace that has been followed in detail by every scheming, backslapping, baby-kissing politician since that day. Absalom prepared himself chariots and fifty horsemen to run before him—the first political ballyhoo of record. He stood by the way of the gate and when any man came to the king for justice Absalom said: "See, thy matters are good and right, but, alas, there is no one deputed of the king to hear thee. O

Let the Commissions Inform the Public

"In my humble judgment, after a brief experience as a utility commissioner, every state utility commissioner should establish an honestly conducted publicity department—not to advance the interests, politically, of the individual commissioners, but to inform the public of what the commission is actually doing, and why, to protect the public from unjust discrimination, and the utilities from the unwarranted attacks of designing politicians."

that I were made judge in the land, that any man might come to me and I would do him justice!"

How familiar that sounds in this day of political ballyhoo and promise!

But it will be remembered that Absalom's rebellion was short-lived. Fleeing from his father's troops Absalom rode his mule into a forest, and in passing under a tree his long and waving hair was caught in the forks of a branch, and the steed riding out from under him left him suspended in midair, and a trooper came along and jabbed him to death with a spear.

Barring the education of the public, I would suggest a law compelling all office seekers to wear long hair and all citizens to plant forked trees.

My own experience as a state utility commissioner covers a period of less than nine months, yet in that time I have experienced what certainly must be common in the experience of all utility commissioners. Let me illustrate:

Recently complaint was filed with this commission against the rates charged by a minor telephone company in a central section of the state. The application demanded a rate reduction of 25 cents a month on residence telephones and 75 cents a month on business telephones. The hearing disclosed that even at the rates prevailing the telephone company had not paid a dividend to its stockholders in six years; that its property had depreciated because a sufficient reserve had not been set up, and that the reduction demanded would result in the bankruptcy of the company. All this was shown to the applicants by figures that could not be successfully disputed; yet, when the application was refused the patrons of the company, through numerous newspapers published in the company zone, were loud in denouncing the commissioners as "tools of a giant monopoly."

On the other hand, the commission had forced reductions in freight rates in the state that saved to the people of that particular section more than the total revenues of the telephone company, but up to date none of the commissioners has received a letter of thanks for the saving in freight rates. Letters and newspaper clippings abusing the commission for not reducing telephone rates offer a startling contrast to the letters and newspaper clippings that have *not* been received by the commission expressing thanks for reductions far greater than those refused.

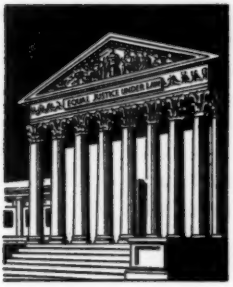
Recently I presided at a hearing wherein a Nebraska railroad applied for a permit to abandon a certain portion of its train service. More than fifty protestants appeared at the hearing, demanding that the service be maintained for their convenience. Private investigation revealed that all but two or three of the protestants came to the hearing in their own automobiles, instead of by the train they sought to maintain for their convenience. When the application of the railroad was granted on showing that the operation of the train cost about 37 cents a mile more than the revenue therefrom, it may easily be imagined what the commission was charged with.

The last eight sessions of the Nebraska legislature have witnessed the introduction of bills for the abolishment of the commission on the ground that it is not acting to protect the public; this despite the fact that the commission's records show beyond dispute that it has gradually brought about reductions in freight and telephone rates that have saved the public several millions of dollars. During the past eight months this commission has granted more than 300 reductions in freight rates, the last order, affecting grain rates, saving to the grain raisers of Nebraska more than a million dollars a year in a year of normal crop production. To date not a letter of commendation. But just refuse a reduction of 10 or 15 cents a month in a telephone rate and then listen!

All this has brought forcefully to my attention the failure of state regulatory commissions to keep the public informed as to the commission's work and results; the failure to show the public the difference between the commissioner who honestly and faithfully endeavors to give a "square deal" to everybody, and the palavering politician who seeks to curry political favor by appealing to prejudice and ignorance.

In my humble judgment, after a brief experience as a utility commissioner, every state utility commission should establish an honestly conducted publicity department—not to advance the interests, politically, of the individual commissioners, but to inform the public of what the commission is actually doing, and why, to protect the public from unjust discrimination, and the utilities from the unwarranted attacks of designing politicians.

My political experience, and I have had a bit, leads me to the conclusion that most utility lobbies appearing at legislative sessions are there to keep designing politicians from putting something over on them, not to put something over on the public.



Value of Utility Service As a Limit upon Rates

A rule for the guidance of regulatory authorities which has been imposed by the courts, the author believes, irrespective of its effect upon the utilities.

By THOMAS J. TINGLEY
OF THE BALTIMORE BAR

FEW decisions of the Supreme Court of the United States have assumed greater contemporary or permanent importance than Smyth *v.* Ames.[1] It amplified and made definite the right of regulation of business affected with a public interest, first announced in Munn *v.* Illinois.[2] It is the purpose of the present article to suggest that the doctrine it enunciated has been tugged by subsequent decisions from its judicial moorings, and that the emphasis placed on certain phases of the decision, while others were virtually ignored, has effected a subtle and perceptible change in the trend of the law as it was first foreshadowed.

It will be recalled that conflicting claims as to the proper basis of valuation constituted one of the most controversial questions before the court. It was ably argued on behalf of the public that the price level had greatly declined since many of the railroads involved were constructed, and that the public should receive the benefit of this change. The Great Commoner and his colleagues, representing the state of Nebraska in the proceedings, sought, in other words, to establish reproduction cost new less depreciation as the proper base for the making of rates. On the other hand, the railroads endeavored to fix original cost as the proper standard.

THE Supreme Court rendered a decision that was, in effect, a compromise between these variant contentions. It held that a utility was entitled to earn a fair return on the fair value of its property used and useful in the public service. The

[1] (1898) 169 U. S. 466, 42 L. ed. 819.
[2] (1877) 94 U. S. 113, 24 L. ed. 77.

value of that property was to be determined with reference to a number of enumerated and suggested factors, among which were both original cost and reproduction cost new. Dominant weight was accorded to none of these factors. To all of them was assigned evidential worth in arriving at fair value.

In addition, the fair return, the court suggested, should be reached after according due consideration to the contemporary cost of money and the degree of risk inherent in the business.

One other principle was established by the court which gave the decision, in even greater degree, the aspect of compromise. The assurance of a fair return as above stated was made subject to the express proviso that *the rates charged must in no event exceed the value of the service to the consuming public*. This limitation was imposed irrespective of the effect upon the utility. The right of the consuming public to a nonexcessive rate was made expressly paramount.

PROMPT and effective efforts were made by the utility bar to extend the scope of the phases of the ruling declaring the rights of the industry. Little was said about the limitation on those rights.

The concept of the property constituting the rate base was expanded to include intangible elements, such as overheads incurred in the course of plant construction, and the value of the business attached to the plant over and above structural value of physical elements in place. When the price level advanced, the effort was made to establish reproduction cost new as the dominant factor in valuation.

At the same time, it was sought to freeze the rate of return required to escape confiscation, at the highest possible level.

The element of reproduction cost was greatly expanded. There was general indulgence in imaginative flights to assume conditions of reconstruction which did not parallel historic fact. Allowance was claimed for the cost of cutting and replacing pavements in the assumed replacement of mains originally laid through meadows or beneath unsurfaced roadways. No stone was left unturned in the stressing of the aspects of the decision found favorable to the claimant industry.

While these efforts were under way, little was done to take advantage of the assurances of public protection implicit in the decision. There was but slight expansion or development of the limitation upon rates imposed by the value of the service.

IN part, beyond doubt, this was due to the fact that most utility rates did not invade the realm of inherent unreasonableness. They might be, and in many cases undoubtedly were, too high, but that was another matter. To establish that they exceeded service value would require exact and definite proof as to what the value of the service was. This would entail the development of standards to measure the worth of the service rendered the limitation to be imposed when application of the standards indicated the propriety of that result.

Virtually no effort to evolve such standards has been made. True, not

many instances present themselves in which the rule is applicable. Obviously, it will be invoked chiefly in connection with developing of moribund utilities or industries. In such cases, normal returns cannot be earned at rates fair to the public, and the principle is fully operative. Patrons of such utilities should receive protection against excessive charges and the assurance of adequate service. Undoubtedly the law in this regard would have been developed with greater fullness had public counsel in rate cases generally been more experienced in the details of a highly specialized practice, and more familiar with governing principles.

It may be objected that the concept of service value is a nebulous one, and the result desired difficult of exact determination. So is the standard of due care in the law of negligence, which is exacted of men in their daily pursuits, and the existence or nonexistence of which, in particular cases is daily decided by twelve laymen selected more or less at random. The concept of the fair value of the utility's property as of a given date is at least as nebulous. Yet it is constantly determined, and with an air of mathematical exactness and nicety.

In determining whether due care exists, an objective standard is chosen, —the conduct of a creature of legal fiction,—the "ordinary prudent man." Mass experience is marshaled to establish a norm of conduct with reference to which that of the individual in question is measured.

The same process is followed in measuring the fair value of utility property. Objective standards are chosen, which do not reflect the character or earning power of the business.

Why, similarly, should it prove difficult to apply objective standards in determining service value? One such standard readily suggests itself,—the effect, actual or probable, of any proposed rate on the use of the service by the public. It must be remembered that it was the public that granted the franchises the utility enjoys, and they were granted in order to assure the public of continued safe and adequate service. When that result is frustrated, the public loses what it bargained to get.

For instance, if an increase in rates to a proposed level has elsewhere resulted in a loss of patronage to utilities similarly circumstanced, it may be anticipated that a similar result will follow if the increase be permitted. The same result would be anticipated when previous increases from lower rates have resulted in some loss of patronage. This throws some light upon the question whether the increase is beyond the value of the service, because value must be gauged from the standpoint of the consumer; and at

¶ "It *is suggested . . . that any rate which materially affects the use of the service is beyond its value, and that any rate resulting in decreased revenue is clearly so. No better gauge could be found of the public's reaction to a rate than its discontinuance in part or altogether of the service.*"

least a portion of the consumers have concretely registered their opinion that the rate is more than the facility furnished is worth, at least for certain purposes.

The foregoing considerations apply with full vigor in cases where substitute service is available to the public, or the service rendered is not virtually indispensable, so that it can be abandoned by the public if the rate charged is too high. In the case of utility service where this is not true,—as, for instance, that of gas or electricity, —consumer dissatisfaction would express itself rather in curtailed use of service than in its abandonment.

ANOTHER question is then presented. Should the test be the effect of the rate on the use of the facility by the public, or the effect upon the revenues of the utility? Obviously, an increased rate may result in diminished patronage, but still provide increased revenues.

It is suggested in this connection that any rate which materially affects the use of the service is beyond its value, and that any rate resulting in decreased revenue is clearly so. No better gauge could be found of the public's reaction to a rate than its discontinuance in part or altogether of the service. But the revenue test may reflect the size of the increase in rate more than it does the reaction of the public. The public might, in other words, react to the same extent to a lower rate. Yet the revenues would show less decline than they would under the lower rate.

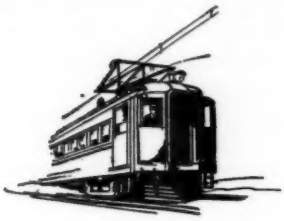
For this general principle to be fully applicable, however, the public reaction should be spontaneous. Engineered enthusiasm resulting in patronage strikes might evidence little or nothing as to the fairness of the charge. The discontinued or decreased user should be spontaneous and permanent, to possess significance.

ANOTHER objective standard sometimes sought to be applied in arriving at service value has been the rates charged for like service in similarly circumstanced communities. This is obviously a less satisfactory basis, and offers far greater opportunity for error. The existence of a rate elsewhere does not prove its fairness. If it did, the lowest rate extant might tend to draw all others to its level.

In United R. & Electric Co. *v.* West,[3] the effort was made by counsel for the public service commission of Maryland to show that a proposed 10-cent street car fare in the city of Baltimore was in excess of the value of a car ride. It was shown that similar fares elsewhere had materially disturbed the riding habit and resulted in a marked loss of patronage. Revenues, however, were slightly but not proportionally increased by such fares.

The Supreme Court of the United States, by a majority decision, held that the company was entitled to earn a return of at least 7.44 per cent, which the company estimated the 10-cent fare would yield. The court intimated that, had the company cared fully to assert its rights, it was probably entitled to earn a return as high as 8 per cent. The 6.26 per cent which the commission estimated the lower fare fixed by it would yield, was declared confiscatory. The service value doctrine was ignored.

[3] 280 U. S. 234, P.U.R.1930A, 225.



Value of the Service Safeguard

"SURELY some thought should be applied to the development of the public safeguard feature in regulatory law afforded by the service value principle. If it is done, many patent absurdities in the application of the regulatory formula can be eliminated, and the well-rounded rule established by Smyth v. Ames be preserved in its original virtue."

This was the more remarkable in view of the fact that the president of the company had admitted, in the course of the hearings before the commission, that any increase in fare *above* 10 cents would unquestionably exceed the value of the service. The issue of service value was thus clearly pertinent.

IT is interesting to note that, since the decision, the company has never earned, under the 10-cent fare, even the rate of return which the commission attempted to assure it. It has been in receivership in the district court of the United States for the district of Maryland. Among other recommendations made by the court in releasing the properties from its jurisdiction, based upon the recommendation of a special master, was one that the 10-cent fare still in effect be reduced.

The judicial assurance of even a 6 per cent return to a company which cannot hope to earn it under any rate it could collect, seems a needless resort to fiction, when an apt and applicable principle is available to meet the situation. Regardless of rate of return or confiscation, was not the real problem presented that of determining the worth of a car ride to the public? Riders were falling away, and the earning of a normal return was out of the question. Only by resort to this limitation could the formula of Smyth *v.* Ames be made applicable to the economic realities involved.

THE court of appeals of Maryland, when the United Railways Case was before it for consideration, considered the service value theory and its applicability to the facts involved.[4] It noted, of course, the difficulty of proof encountered in this connection. It discussed, however, a number of objective standards which might be applied to determine this upper limit

[4] 155 Md. 572, P.U.R.1928D, 141, 193.

upon the reasonableness of rates. Its treatment of the subject was interesting, and indicated that considerable thought had been given to the matter. It is probably the fullest judicial analysis extant of the methods by which service value is to be measured.

THE court was most impressed by the decline in patronage under similar rates elsewhere. The difficulty which it encountered in this connection was in proving the relationship between such decline and the rate increase.

It rejected the suggestion that the value of service was to be determined by the cost of substitute service, because no public agency similarly circumstanced was engaged in furnishing a like facility. The cost of operating a private automobile, which constituted the greatest competitor of the street car system, was held to bear no relationship to that of operating cars for public carriage.

The cost of rendering service of a like character elsewhere was rejected as irrelevant, doubtless for reasons above assigned.

It was further held that changes in the price of other commodities, or in the purchasing power of the dollar, bore no relation to the problem. The worth of service, said the court, cannot be gauged by the affluence of the buyer or user.

So much for the negative aspects of the problem. Granted the difficulties, the establishment of affirmative standards in the premises is not attended by insuperable difficulties. The requirement is that objective standards be developed, closely related to the actual problem to be determined. One such standard, as the Maryland Court of Appeals said, might not be causally connected with service value, but a rate representing service value secured from the application of a number of objective factors should have some probative weight.

SURELY some thought should be applied to the development of the public safeguard feature in regulatory law afforded by the service value principle. If it is done, many patent absurdities in the application of the regulatory formula can be eliminated, and the well-rounded rule established by Smyth *v.* Ames be preserved in its original virtue.

Confidence in regulation will be promoted, and the rights of the public will receive the protection originally assured them. This situation would of course react to the ultimate benefit of both the utility companies and their patrons.

PRODUCTION of hydroelectric power has been expanding rapidly in Italy. From 7,055,000,000 kilowatts in 1925 it rose to 11,560,000,000 in 1934 and still is rising this year. Nevertheless, the complete change over from coal to hydroelectric power is a long-range project and it has been noted that imports of coal in the past few years have varied according to internal domestic industrial production.

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

JOHN T. FLYNN
Economist and Writer.

"About ten years ago few farms had electricity—about 16,000 out of over 6,000,000."

HUDSON W. REED
Special Executive Assistant, United Gas Improvement Company.

"If you place rural electrification on a strictly business basis, progress will be slow."

CHARLES L. McNARY
United States Senator from Oregon.

" 'Free power for nothing' is a myth, a political legend. You've got to pay for it. Let's face reality."

GLENN FRANK
President, University of Wisconsin.

"Private profit is not the major incentive that holds the majority of industrial captains at their posts."

GEORGE W. NORRIS
U. S. Senator from Nebraska.

"The TVA has given a lesson in regard to labor. If its policies were followed, all labor disputes would end."

A. E. MORGAN
Chairman, Tennessee Valley Authority.

"America needs instruction in efficient, conscientious, ambitious, selfless government, as much as it needs dams and electrical lines."

L. A. COWLES
Secretary, Minnesota Municipal Utilities Association.

"From the operating end, the private plants are efficiently managed, and they maintain, generally, a high standard of service."

REPORT
Arkansas State Planning Board.

"Studies show that modern large steam plants in the state are generating current more cheaply than the average hydroelectric plants."

REPORT
Iowa State Planning Board.

"While a few public utilities have spent considerable time and money in an effort to develop a profitable rural load, the farmers themselves have been the real pioneers in Iowa rural electrification."

REPORT
National Resources Committee.

"Electricity must be given no small part of the credit for having made possible the amazing increase in the man-hour production of manufacturing enterprises, and the substantial reduction in the hours of labor and the physical burdens of laborers."

Dams for Power and Dams for Other Purposes

THE relation of water-power production to navigation and flood control considered by the author, both from the standpoint of the constitutional limitation upon Federal authority and from the standpoint of economics; and the conclusion reached that the requirements for power production differ from those for river improvement to such an extent that a project for both purposes is questionable.

By HORACE R. THAYER

THE Constitution under which the United States operates is a remarkable document. Guided by it, we have passed 148 years as a prosperous nation, combining, to the largest possible extent, efficiency in governmental activities, responsibility of this government to its citizens, and freedom and individual opportunity to all. We are likely to forget the fact that many of its provisions which may seem needless or inefficient are really necessary if we wish to retain for our descendants those blessings which have attended us in the past.

Minor changes have been made and they will doubtless continue to be made. It is to be hoped, however, that the essential purposes of this document will remain unchanged and will continue to guide the affairs of the nation. Our Constitution is the embodiment of the law of the land to which most of us have pledged allegiance in the belief that it is far better than the fallacies advanced to take its place.

The Constitution of the United States provides that "Congress shall have the power to regulate commerce with foreign nations, and among the several states and with the Indian tribes." It also states that "Congress shall have the power to establish post offices and post roads."

From these two passages it would seem that the government might be expected to care for streams that can be used for commerce. As the expression goes, it is an "inferred pow-

er." Also, careful consideration will lead one to believe it would be best if Congress should exercise this "inferred power." This view is generally accepted and rightly so.

It might be well if we stopped here but some go much further and take a position which pushes the doctrine of inferred power to a questionable extreme. The storage of water has an effect upon the flow of the river; therefore, it is contended, the government has a right to regulate the construction of dams for power, even though the matter in question has no necessary connection with commerce. Going still further from the wise provisions of the Constitution, it is claimed from the preceding that the government has the right to oversee every detail of this power production and of its distribution or even to generate and sell electric current on its own account.

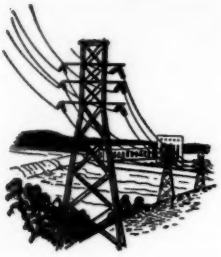
To discuss the legal merits of these contentions, it is necessary to take into account a few simple facts about power, flood control, and navigation and the way each is related to the others.

Water power is usually derived from a river. The water in the stream is made to pass through vanes on wheels in such a way as to turn the wheels which, in turn, are connected to dynamos. When losses due to friction are considered, one cubic foot of water per minute falling through one foot (the fall is the vertical distance between the water above and the water below the wheel) will produce one watt. Other amounts and falls have an effect that is approximately proportional, thus 2,000 cubic feet per minute falling through 60 feet should produce about 120,000 watts or 120 kilowatts.

The task of the engineer would be quite simple if the stream were always uniform in size and velocity. Unfortunately this is not usually true. At times, the river overflows its banks and the current becomes quite rapid. At other periods the stream shrinks until the total flow is very small; in fact it sometimes disappears altogether. For a typical stream draining a thousand square miles, the discharge might be 100,000 cubic feet per second in a flood and perhaps 100 cubic feet per second in a drought.

One need not dwell upon the effect of these variations. The most fertile farm lands and the larger communities lie on or near the rivers. Hence the sudden rise of the stream in flood time causes extensive damage. On the other hand the low water in a dry season often interrupts steamboat service or limits it to shallow vessels. Again, these fluctuations render storage of flood waters which could be utilized in power production.

Power is usually sold at customer's option; that is to say, the customer is at liberty to use as much or as little as he pleases. Whatever the variation the power company must deliver what is required, even though a large number of its patrons desire a large amount of current at the same time. This is quite likely to occur when industry is prosperous on a dark winter afternoon around 4 or 5 o'clock. At such a time the electric current used may be several times the average. The variations in demand differ with the district but consumption is likely to be larger in winter than in summer



Questionable Right of Government to Develop Water Power

"It is difficult to find any legal basis for the national right to produce water power in many instances. . . . There would be more basis and more logic for the government to undertake the manufacture of automobiles because of their use in interstate commerce than there is for it to undertake the production of water power because of its effect upon navigation."

and small during holidays, week ends, and the summer months.

It would be fortunate, indeed, if the demand for power fluctuated the same way as the river did. However, this is not the case. Hence to furnish water for power, large dams are built to store the floods of spring for the dry months of the summer and fall. Not only must enough water be held back so that sufficient power can be developed at all times but the water in the reservoir must be kept at such a height that the waterwheels will operate efficiently. It will also be evident that increasing the height of the dam increases the power as well as the storage.

Now let us compare projects for power, flood control, and navigation.

Dams for power are built as closely as possible to the point where the electricity will be used and where quantity of water times head is the greatest.

Dams for controlling floods and improving navigation are built to impound as much water as possible regardless of the head. This locates them at the point where the flood damage begins to be serious, or at the head of navigation. Dams near the upper end of a stream control but a small portion of the watershed; hence they are worth but little for river improvement.

For power production, the reservoir is kept full or nearly full all the time. Water is gradually released as needed to produce power.

For flood control the reservoir is kept empty until flood comes when it is filled.

For promoting navigation the reservoir is kept full until a dry spell is reached when it is gradually emptied.

DAMS which, like the Boulder dam, hold back the entire flow over a long period may be used fairly effectively for all three purposes. However, for common cases we may make this statement:

The requirements for power production differ from those for river improvement to such an extent that a project for both purposes is questionable.

The questions considered thus far have been of an engineering nature. Let us now turn to the economic side, understanding that the term "cost" covers interest, operation, maintenance, and sinking fund.

The cost of a water-power project, that is, that portion allocatable to power production purposes, should not exceed the cost of a steam plant for the given district nor should it be greater than the amount that may be properly charged against the probable demand for power.

The cost of preventing floods should never be greater than the flood damage it will prevent; neither should it exceed the cost of other methods of flood prevention. It should be carefully borne in mind that reservoirs only lessen floods; in general they are very expensive compared with the resulting benefits.

The cost of improving navigation by raising the water level in the dry season should not exceed the losses incurred by a temporary use of some other means of transportation; neither should it exceed the cost of equal improvement by some other method.

IT would seem clear that the government's right to control navigable rivers would carry with it the supervision of the production of power *in so far as it applied to navigation.* It seems reasonable that Congress might insist that low water should not be lowered and that floods should not be increased. I believe too that it might condemn all or a part of a power project or impose certain conditions that would improve navigation, always assuming that it paid a fair and reasonable price for what is condemned. I believe also that it is entirely fitting that certain precautions to ensure the safety of lives and property below the dam should be rigidly enforced.

The Constitution provides for the control of interstate commerce. It seems reasonable that transmission lines between states should be made entirely safe and that the remuneration charged for such transmission might be legally regulated by Congress.

However, there remains a vast field in which the government is active for which there seems to be no justification. It is difficult, indeed, to find any legal basis for the national right to produce water power in many instances. It has been here shown in a general way that its effect upon navigation is very small. There would be more basis and more logic for the government to undertake the manufacture of automobiles because of their use in interstate commerce than there is for it to undertake the production of water power because of its effect upon navigation.

FOR purposes of discussion let us now divide power projects into four classes:

Those in which flood control and navigation are principal purposes but

as much power is produced as is consistent with these aims.

Those in which power production is the main thought but there is some flood control or improvement of navigation.

Those in which flood control or the improvement of navigation could be obtained more effectively or more economically in some other manner.

Those in which there is no appreciable effect upon flood control or navigation.

These are general classifications that might clarify the legal issues in discussing particular hydroelectric projects. In involved and perplexing cases the problem offers no difficulty to the trained engineer. To him the surveys, designs, plans, and estimates are like an open book, classifying the project in such a manner as to remove all doubt.

APPLYING accepted principles of constitutional law to these classifications, it would seem that projects in which flood control and navigation are the principal purposes would be within the constitutional powers of Congress, although less question might be raised if the right to use the reservoir for river improvement were obtained through condemnation proceedings.

It seems equally clear that the construction of projects in which power production is the main thought, and flood control or improvement of navigation incidental; or those in which flood control or the improvement of navigation could be obtained more effectively or more economically in some other manner; or those in which there is no appreciable effect upon flood control or navigation, could not be undertaken legally by the government.

Perhaps the greatest benefit of several clean-cut test cases on particular hydro power projects before the Supreme Court would be to expose the rather dubious and shadowy relation between power projects and river improvement.

The Subterranean Empire

NEW York city's water supply system is internationally famous. According to the latest figures it contains 4,587 miles of pipe—enough to reach from New York to San Francisco and nearly half-way back again. These pipes vary in size from 4 inches to 6 feet. They distribute an average of about 900,000,000 gallons of water a day, or 130 gallons per day per capita. Under East Broadway there are some original cast-iron mains which have been in service since 1842. The aqueducts which bring the water from the reservoirs in the Catskills and the Croton watershed, some of them 100 miles distant, are marvels of modern engineering skill.

Financial News and Comment

By OWEN ELY

Utilities Win First Round of Legal Battle

JUDGE Coleman's decision November 7th holding the Public Utility Act of 1935 unconstitutional in its entirety was an eminently logical and satisfactory defense of states' rights against growing Federal encroachment in the regulation of intrastate business.[1]

At this time it is difficult to state whether the case can be appealed directly to the Supreme Court. While the government entered the case only as a "friend of the court" and cannot itself make any appeal, which must be carried out by Burco, Inc. (representative of the bondholders of the American States Public Service Co.), government consent appears to be essential to "by-passing" the circuit court of appeals.

SEC to Study Investment Trusts under Utility Act

THE SEC announced November 6th that a comprehensive investigation of investment trusts and investment companies, authorized by § 30 of the utility act, will be started immediately under the direction of Commissioner Robert E. Healy. It is understood that questionnaires will be sent to investment trusts, supplemented by field inspections, to be followed by a series of hearings.

The commission is not limited to the investigation of trusts which have specialized in utility holdings such as United Corporation, but will make a general study of all trusts and their relations to companies in which they are interested.

There is at present no Federal regulation of investment trusts except in connection with new security issues or registration of their securities on the exchanges. Presumably the present study is designed to determine the desirability of Federal regulation. Most investment-trust securities are traded in over-the-counter markets and the regulation of over-the-counter security markets is still in an indefinite stage.

Final Approval of Middle West Plan Deferred

FEDERAL Judge Wilkerson at Chicago on November 6th tentatively approved plans submitted for reorganization of the Middle West Utilities Co., but made final approval contingent on improved treatment for preferred and common stockholders, whom he contended should receive stock purchase options in addition to the stock to be allotted them. As representatives of the bank creditors and note-holders had previously declared they had made the fullest possible concessions to stockholders, some uncertainty resulted regarding acceptability of the amendments desired by Judge Wilkerson.

Under present terms preferred stockholders get 1 new share for each 4 old, and common stockholders 1 share for

[1] For summary of decision, see *post*, p. 786.

each 100 old shares, thus obtaining jointly 10 per cent of the new stock. Of the remaining 90 per cent, 53 per cent would go to bank creditors and 47 per cent to note-holders. Judge Wilkerson suggested issuing a warrant for each 2 shares preferred and each 50 shares of common entitling the holders to buy 1 share of new stock at $5. He also held that the court's jurisdiction should be continued until July 1, 1937, with power to name officers and directors.

The court's opinion was regarded as a victory for minority security interests.

PWA Loans to Municipal Plants

It is difficult at this writing to summarize election results regarding referendums by municipal voters on proposals to build municipal plants. Two of the more important votes were in Albany and Camden, both of which favored municipal plants. The question in Camden has been a municipal issue for several years, and as further legal or legislative action may prove necessary (as well as securing necessary funds) it will probably remain in the political rather than construction stage for some time to come. The plant, if eventually constructed, would have an adverse effect on Public Service Corporation of New Jersey.

Northern States Power Co. has obtained a temporary restraining order from the supreme court of the District of Columbia holding up a $472,000 PWA loan and grant for erection of a municipal plant at Grand Forks, N. D., which it was held threatened the company's $950,000 investment in that city and might prevent it from supplying power to nine adjacent communities.

The general program of the PWA for construction of municipal plants is still difficult to check statistically. Dr. Clark Foreman, head of the PWA power division, was recently quoted as stating that the old PWA appropriation had been used as follows: $50,000,000 for TVA; $146,250,000 for the Bonneville, Grand Coulee, Ft. Peck, and Boulder dams and the Casper-Alcova project; and $46,268,900 for various municipal allotments. Of the PWA $330,000,000 work relief allotment $6,106,835 has been assigned to 63 municipal generating systems and $1,966,490 to 23 distribution systems.

That the PWA itself seems not altogether clearly informed regarding the status of many of these projects seems indicated by the statement that twelve engineers have been called in from the field to compile lists of approved projects and those left stranded by the reduction in the PWA's allotment, although what action would be taken regarding left-over applications remains in doubt. Secretary Ickes and Administrator Hopkins of the WPA recently stated that the December 15th deadline for starting all work relief projects would not apply to municipal power allotments in cases where delays were caused by "unfair attacks" in the courts. Mr. Ickes is said to feel that there is a "common source" for numerous legal attacks on the municipal allotments.

Assessed valuations of realty held by utilities of New York city have now been raised some $203,000,000, in line with the contention of Mayor La Guardia that the companies should give the same figures for taxation as for rate-making purposes. Corporation Counsel Windels states that in most cases higher valuations were arrived at in figures submitted by the utilities to the public service commission, but were specially computed in other cases.

Transit Accord Reached in New York City

A detailed but tentative agreement for purchase of the I.R.T. and Manhattan Railway transit properties was issued November 1st by Judge Seabury and City Chamberlain Berle. In general the plan followed lines indicated in advance reports, already outlined in

this department. Purchase of the combined I.R.T.-B.M.T. properties for about $431,751,000 would give the city complete control of 162 miles of subway routes and 95 miles of elevated structure, in which it already had a partial interest, the total investment being figured at around $1,200,000,000—a figure comparable to the cost of the New York Central Railroad.

The price to be paid by the city for the Interborough-Manhattan properties is explained as follows:

	Capital Amount
Cash	$16,946,000
City corporate stock (3¼%)	48,022,000
Board of Transit Control bonds:	
First lien 4½%	96,044,000
First lien 4%	6,778,000
Second lien 4½%	43,015,000
Second lien 4%	27,446,000
Total	$238,251,000
Less: Depreciation funds, securities at market	6,000,000
Net amount	$232,251,000

Neither the B.M.T. agreement (published February 20th) or the Interborough-Manhattan agreement (November 1st) revealed the exact exchange which would be offered to security holders of the two systems, but merely indicated the total amounts of the various kinds of bonds to be issued by the city to each system. To attempt to work out a schedule of exchanges is therefore a difficult problem, but various "clues" are afforded by the amounts of bonds mentioned (particularly for Interborough-Manhattan), and the writer has compiled, as indicated in the table below, the approximate basis of exchange.

Revamping of Associated Gas System Continues

FEDERAL Judge Mack, at the joint request of counsel for creditors and counsel for the Associated Gas & Electric Co., has deferred further hearings until December 4th. It was stated that there would soon be an important announcement, presumably regarding changes in the corporate structure of the

	Cash	N. Y. City Corp. Stock 3¼%	N. Y. City Corp. Stock 4%	Board of Transit Control 1st 4%	Board of Transit Control 1st 4½%	Board of Transit Control 2d 4%	Board of Transit Control 2d 4½%	Board of Transit Control 2d 5½%	Assumed by Board
Interborough									
Refunding 5s		33⅓%			66⅔%				
7% Notes		33 [1]			67 [1]				
6% Notes						100%			
Stock							35%		
Manhattan									
Consolidated 4s	41.7%			16.6%		41.7			
Second 4s							67		
Original Stock							90		
Modified Stock							43		
Brooklyn-Manhattan									
Kings County El. 4s									100%
Brooklyn Union El. 5s									100
B. M. T. 6s, 1968 [2]									
B. M. T. 6s, 1949 [2]									
N.Y. Rapid Transit 6s [2]			35		65				
Preferred Stock [2]									
Common Stock								Note A	

[1] Percentage of amount of claims (not par).
[2] Amounts outstanding taken at redemption values.

Note A: No details have been issued regarding division of the various securities to be paid by the city for the B. M. T. property, but analysis of the figures indicates the likelihood that the $40,536,420 of Board of Transit Control second mortgage 5½% bonds is intended to represent the equity of the common stockholders. Assuming that the bonds sell at par and that miscellaneous equities (outside unification) are worth about $5 per share, total equity per share B. M. T. common is estimated at about $60.

system. Mr. Kraus, counsel for the creditors, indicated that it was hoped to further reduce the large number of separate units to one or two holding companies which would directly own and control all the operating companies within the system. Since October 8th steps have been adopted leading to the elimination of thirty additional companies from the system.

One of the latest changes was announced at Baltimore, where the public service commission signed an order eliminating Metropolitan Edison Co. as one link in the chain. Under the new set-up Associated Gas owns the Metropolitan Edison Corporation, which in turn owns both the Metropolitan Edison Co. and the Maryland Public Service Co.

Bell System October Gains Largest in Six Years

THE Bell System and the New York Telephone Company both made an excellent operating showing for October. While earnings figures have not yet been released the preliminary statement regarding number of stations is of special interest, showing gains exceeding those of any corresponding month since 1929. The Bell System in October gained 62,000 stations, which was nearly double the gain of the same month for 1934. New York Telephone showed a gain of 6,633 stations against only 1,202 last year; and for the first ten months 12,714 compared with a gain of 1,376 last year.

For the ten months to October 31st the Bell System as a whole gained 34 per cent more stations than last year and Dow Jones has estimated a gain of about 40 per cent for the year, compared with last year's increase.

Utility Systems Publishing Monthly Reports

IN connection with previous comment in this section regarding the difficulty of compiling a worth-while index of the trend of utility earnings, because of the variation in the form of interim reports published by utility companies, returns of the leading systems have been analyzed to determine how many systems release monthly reports of net income. Only four were discovered—American Gas & Electric, Commonwealth & Southern, Public Service Corporation of New Jersey, and Edison Electric Illuminating of Boston. American Water Works reports gross income before depreciation, but not net income.

Utilities Defer Registration under Utility Act

DUE apparently to the decision of Judge Coleman at Baltimore, most of the large holding companies have taken no official action as yet regarding registration with the SEC, required by December 1st, despite the fact that the commission has indicated its willingness to accept applications with a "rider" reserving constitutional rights. As of November 8th the SEC had not been definitely informed except by one small holding company of any company's intention to register.

According to the *New York Times* of November 9th:

> A survey of utility opinion here yesterday indicated that, in most instances, the tendency to fight the act has been stiffened by the Baltimore decision, the only divergent attitude among companies of the first rank being the opinion prevailing in Associated Gas and Electric quarters that registration should be effected and recourse to the courts reserved for any order or action by the SEC affecting the system that cannot be settled amicably.

Failure of the companies to indicate intention to register has apparently caused some uneasiness at the SEC. Chairman Landis issued a statement November 8th calling attention of stockholders to the dangers that lay ahead if their companies failed to register. Such failure might affect the validity of any security issues, property acquisitions, and contracts made by such companies.

Holding companies will also be subject to penalties up to $200,000, unless the Supreme Court eventually declares the law unconstitutional.

MR. Landis indicated his belief that the recent rush of security registrations—about $300,000,000 in the two weeks ended November 8th—had been influenced by the fact that after December 1st holding companies are forbidden to market securities unless they have registered with SEC.

There has been no indication as yet that the SEC would permit the Baltimore Case to be carried directly to the Supreme Court, and the interview with Mr. Landis seemed to indicate his expectation that it would first go to the appellate court.

Mr. Landis pointed out that the act of registration had been made as simple as possible, the form containing only five questions and calling for three exhibits. He also indicated that if a holding company which failed to register should take "some forbidden step" after December 1st, the commission would probably seek an injunction and carry the matter to the Supreme Court. The law does not recite any penalties making registration mandatory, so that the commission would have to resort to § 4 which specifies activities in which an unregistered holding company may not engage; these are so broad (covering the use of mails for the sale of gas or electricity) as to furnish an immediate test if desired.

Press comment indicates that the utilities, instead of waiting for the SEC to obtain injunctions against them after December 1st, might themselves ask injunctions to restrain the SEC from denying the use of the mails to them.

THE Federal Power Commission has announced a temporary suspension of action on all applications for its approval of mergers, consolidations, sales, etc., of utility facilities in order to work out coöperative procedure between itself and the SEC. The SEC is considered to have priority of jurisdiction, although in a general way its authority is limited to holding companies and that of the FPC to operating companies. The announcement was made in connection with application of the Florida Power Corporation to take over two subsidiaries. Four applications from companies affiliated with the Associated Gas & Electric are also pending.

A general test of the utility act may be made by the Commonwealth & Southern Corporation. This was recently indicated when its subsidiary, Ohio Edison Company, filed a supplemental registration statement for $43,963,500 first mortgage bonds.

Pacific Lighting Corporation has applied for exemption from the act for itself and its subsidiaries, and hearings will begin November 14th. The application contained a waiver regarding constitutional rights.

According to a statement of the Federal Power Commission, applications for continuance of "interlocking directors" were received from only 800 executives before the dead line of October 25th, although the number of directors had been unofficially estimated at about 1,500. Executives are not compelled to resign conflicting directorates until February 26th, however.

Notes on New Financing

THERE has been somewhat of a lull in utility financing recently. In the week ended November 1st, $26,000,000 Columbus Railway Power & Light 4s of 1965 at 101½ were offered by a syndicate headed by the First Boston Corporation; and $7,300,000 Blackstone Valley Gas & Electric Co. 4s, 1965 at 102½ by a syndicate headed jointly by Estabrook & Co. and Stone & Webster and Blodget, Inc.

There were 235,225.4 shares of the Cleveland Electric Illuminating Co. $4.50 preferred stock offered at $102.75 per share by a syndicate headed by Dillon, Read & Co. The offering consisted of 152,817 shares to be purchased from the company and 82,408 shares from the North American Edison Co., the latter

not representing financing by the Cleveland Co. Provision was made to give holders of the present outstanding preferred stock authorized in 1923 (to be called December 1st at $110) an opportunity to purchase the new stock on a share-for-share basis.

In the week ended November 8th only one piece of major utility financing appeared, that of the Monongahela West Penn Public Service Co., which issued $22,000,000 first mortgage 4½s, 1960 and $7,500,000 debenture 6s, 1965, both at par. W. C. Langley & Co. headed the syndicate.

It has been anticipated that a rush of new financing may develop to beat the December 1st registration "dead-line."

RECENT registrations of new issues include the $25,000,000 New York & Queens Electric Light & Power Co. (Long Island City) first and consolidated 3½s due 1965 (price not indicated); and $15,000,000 Central Maine Power Co. first and general 4s, series G, due 1960. The latter company had previously made application for an issue of $29,500,000 refunding 4½s, which issue was superseded by the new application. The company makes the contention that it is not a company operating in interstate commerce; the registration statement mentions the new Passamaquoddy project of the Federal government as a possible unfavorable factor in the future.

The Long Island Lighting Co. is considering a refunding program, according to a statement by Vice President Barrett. A small amount of financing was recently handled on a private basis through sale of $5,992,000 first refunding 4s to several insurance companies. The company has claimed exemption under the Public Utility Act.

Iowa Southern Utilities Co. of Delaware has registered an issue of $5,000,000 first and refunding 5½s due 1950, to be underwritten by W. C. Langley & Co. and others. It was indicated in the application that the company has under consideration sale, exchange, or other disposal of the controlling interest which it holds in Albia Light & Railway Co. and National Light and Power Co. Ltd.

Canadian Utilities Ltd. on October 29th filed an application covering $2,450,000 first 5s due 1955. The syndicate will probably be headed by E. H. Rollins & Sons.

ON October 30th the following important registrations were made: Ohio Edison Company, operating under the Commonwealth & Southern System in Ohio, $43,963,500 of first and consolidated mortgage bonds, series of 1935, due 1965. The interest rate has not yet been determined.

Los Angeles Gas & Electric Corporation of Los Angeles, $40,000,000 of first and general mortgage bonds, series of 4s, due 1970.

Southwestern Gas and Electric Company of Shreveport, La., a subsidiary of Middle West Utilities Co., $16,000,000 of first mortgage 4 per cent bonds, series D, due November 1, 1960, and $4,500,000 of 4 per cent serial debentures, series A, due serially November 1, 1936, to November 1, 1945.

Third Avenue Railway Co. is making early preparations for the refunding of its $5,000,000 first 5s due in July, 1937, according to a lengthy analysis of the company's financial position in *The Wall Street Journal* of October 30th.

Halsey, Stuart & Co. are resorting to legal action to block the $20,500,000 proposed financing of the Southwestern Gas & Electric Co., it was reported November 4th. The company is a part of the Middle West Utilities Co., now in receivership, and the proposed financing was to have been carried out by a group headed by Brown, Harriman & Co., Inc. Halsey, Stuart & Co. contend that the proposed financing would make unwarranted demands on the future cash position of the utility company because of the serial maturities of debentures, amounting to $450,000 yearly during 1936–1945. The firm is interested as a probable stockholder of Central & Southwest Utilities Co. (controlling Southwestern Gas) in the pending reorganization of the Middle West system.

What Others Think

The Press Bows to the Judiciary

THAT the judiciary, particularly the Federal judiciary, continues to enjoy the respect of nearly all classes in the United States was clearly borne out in the editorial reaction of the press to the recent decision of Federal District Judge Coleman of Baltimore, branding the Public Utility Act of 1935 as "unconstitutional in its entirety." It might have been anticipated that many of the newspaper editors who were so zealously in favor of passage of the law might still be so under the excitable influence of the memorable "death sentence" battle in the House of Representatives, as to attack vigorously the individual jurist who presumed to block and cast out the controversial statute as illegal and "grossly arbitrary, unreasonable, and capricious." Seldom if ever has a Federal law been condemned from the bench in such scathing language. One might naturally suppose that it would bring forth answers in the same spirit, or even stronger terms, from editorial champions. Nothing of the sort happened, however. Regrets were expressed as to the import of the Coleman decision by pro-New Deal editors. Hope that the decision would be reversed was likewise expressed. But, by and large, the reaction was exceedingly well tempered compared to the bitter cat-and-dog wrangling and name calling that cluttered up the press when the "death sentence" debate was at white heat in Congress last May.

The Philadelphia Record, perhaps the most outspoken of Democratic organs, went so far as to question the propriety of the proceedings on the score of "collusion" because the government was not party to the proceedings. The *Record* stated in part:

> The government of the United States, which is charged with the enforcement of the law and is responsible for it, was not even allowed to become a party to the suit. The government was not allowed to defend its constitutionality.
>
> The utilities "put over a fast one" and the resentment thus generated will come back in a thousand ways to haunt a hundred utilities throughout the country.
>
> What the utilities need today is not slick legal maneuvering but a restoration of public confidence in the honesty, stability, and social efficiency of utility companies. The way the Baltimore Case was handled will certainly do nothing to restore confidence in the good faith of the public utilities.

OPINIONS naturally differ on the above point. In fact the government declined to intervene. However, on the merits of the Coleman decision, the *Record* had only this to say:

> What's unconstitutional about protecting investors from a similar fate in the future?
>
> But many holding companies were not innocent victims of the depression.
>
> In many of them collapse is attributable to dishonest management made possible by intercorporate intricacy and skulduggery.
>
> The holding company act was passed to protect investors and consumers from such fraudulent practices.
>
> It does not take away property.
>
> It protects property.
>
> It does not infringe rights.
>
> It protects them.
>
> But it does make it harder for a little group of insiders to do as they please with other people's money.
>
> What's unconstitutional about preventing fraud in an interstate holding company?

The Scripps-Howard papers, well known as most uncompromising utility-baiters, likewise questioned the propriety of the "ex parte" proceedings, whereby the constitutionality of the Public Utility Act was brought before the Federal court without the government being a party of record. Beyond this, however, the Scripps-Howard papers merely expressed an emphatic difference of opinion as to the merits of the Coleman decision. Its capitol paper,

the *Washington Daily News,* stated in part:

> We can't help thinking that Chief Justice Marshall must have revolved like a pinwheel in his grave as Judge Coleman read the opinion ruling the utility holding company act unconstitutional. . . .
>
> So we have a Federal judge conceding that utility holding companies may be guilty of serious abuses, may by their spurious corporate devices obstruct and frustrate state regulation, may peddle watered stock to investors, may overcharge electric and gas consumers in an effort to support such overcapitalized structure, may concentrate control of far-flung properties "in the hands of a few powerful groups having a relatively insignificant stake in their ownership; that such concentration has tended substantially to restrict competition."
>
> Nevertheless, the judge says, a national public interest does not exist.
>
> "Every exercise of congressional power," he says, "must find its justification in some authority delegated by the Constitution. If such authority is lacking, then it matters not how important or unwilling the states may be or may appear to be, with respect to the desired ends, Congress may not interfere."
>
> We cannot bring ourselves to believe that a majority of the justices of the Supreme Court—when and if a properly instituted test case of the holding company law reaches that tribunal—will subscribe to a confession that the Constitution makes our government incompetent to govern.

CONCERNING the so-called "collusion" charge against the Coleman decision, the conservative press was somewhat scornful, while the independent press seemed indifferent. The conservative *New York Herald Tribune* stated in part:

> Quite properly, considering the thousands of large and small savings at stake, the companies have pressed for an early decision on the basic problem of constitutionality. As a result, despite technical obstacles raised by the government, comes the Coleman decision. If it is too sweeping, the Supreme Court can say so. We see little in the objection that the government is not a party to the suit, since the court, following its custom, will unquestionably grant every opportunity to the administration to present its arguments, in briefs and through counsel. Most important of all, an early verdict as to this vindictive and reckless legislation is now possible.

The usually independent *Washington* (D. C.) *Evening Star* likewise could see no reason why an early decision on such an important statute should not be sought through proceedings such as led up to Judge Coleman's decision in this litigation:

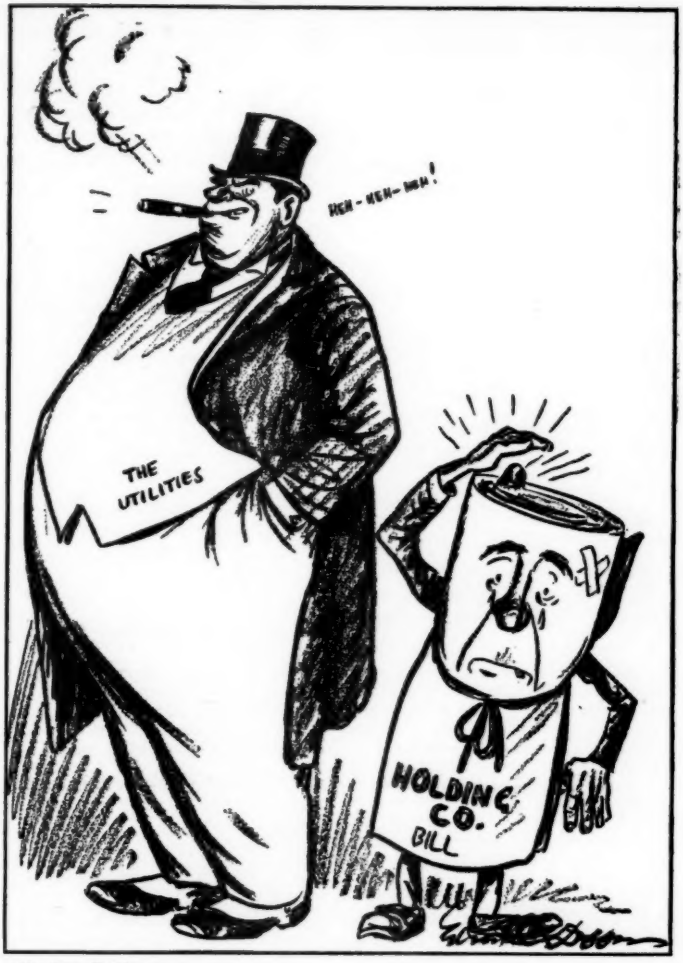
> Mr. Burns, speaking for the government, charged that the same utility interests which opposed the bill before Congress were furthering this case to test the constitutionality of the act. That is probable. If the country must wait for the proponents of the act to make the test it might have to wait a long time.

Likewise, the *Cleveland* (O.) *Plain Dealer* stated editorially:

> Because the issues involved in all these cases are of such far-reaching importance early decisions are from every point of view desirable. That the decisions will have a direct bearing both on the course of legislation in the next Congress and probably on that of business and industry in 1936 is fairly apparent.

THE *Baltimore* (Md.) *Sun,* usually Democratic, but also often critical of New Deal policies, even pointed out that the government counsels might better employ their time in research so as to defend Federal laws more competently, instead of using their talents to avoid or protract constitutional litigation. It stated:

> It will be taken for granted that if this case (or some other if this one is sidetracked) goes the full route to the Supreme Court the government will find a way to make the debate thorough and searching. After the NRA debacle, the authorities at Washington should realize that it is not enough to proclaim some "new order" and count upon the courts to interpret legislation in the same mood in which the majorities in Congress have enacted it. The courts are more and more concerned not only with the existence of abuses, but with the nature of remedies—for, of course, they also may become abuses and perhaps very grave ones. It is now necessary for the administration in all cases, and certainly in this one, to be prepared to prove that its remedies for abuses acknowledged by all are within the constitutional order. And neither stump speeches nor fireside talks will be adequate forms of the proof that is needed.
>
> Instead, a high order of legal ability and of training in constitutional law will be necessary, if the debate in the court rooms is not to be one-sided and if the flexibilities of the Constitution are to be thoroughly explored in behalf of the government.



The Sun, Baltimore

BACK, BACK, BACK, FROM BALTIMORE

FEW of the conservative editors went so far as to express their opinion as to the merits of the Coleman decision. This reticence is quite understandable because the legal reasoning of the constitutional litigation involved is beyond the accustomed sphere of laymen's comment. However, the *New York Herald Tribune* ventured to remark:

The sweeping decision handed down by Judge Coleman, of Baltimore, against the Public Utilities Act of 1935 is another cheering sign of the times. This is not because he is necessarily right in all his conclusions. This muddled and malevolent law raises so many and such complex constitutional problems that only when the Supreme Court has finally spoken will the country know what, if any, part of this legislation is in effect. But the courage and

vigor with which he has attacked these problems is a welcome reminder of the unanimity with which the Supreme Court ended NRA.

The Wall Street Journal was intrigued by Judge Coleman's distinction between the *user* and the *use* of Federal mails. The judge ruled that Congress may properly exclude from use of the mails only in cases where the matter itself mailed is objectionable for proper reasons, but never because the sender might be regarded by Congress as objectionable. The *Journal* stated:

> This distinction between the user and the use is not merely fundamental but of the most far-reaching importance to the elemental liberties of the citizen, for if it be not necessary under the Constitution to observe it, the Federal government will have in its hands a power to compel the citizen to act or to refrain from acting as the government may choose to determine, and that at practically any time in respect of practically anything.

THIS point of the Coleman opinion was likewise noted with approval by the *Newark* (N. J.) *Evening News*. It stated editorially:

> The Congress made unwarranted use of its postal powers, if it did not exceed them, in denying the use of the mails to corporations that do not obey SEC rulings. Judge Coleman asserts it did exceed those powers. The restriction is not upon the character of the material mailed, but upon the users of the mails, as such. Even if the law is sustained by the Supreme Court, this vicious feature ought to be expunged by the Congress. . . .

Even the liberals might scrutinize the principles laid down by Judge Coleman on regulating the use of the mails before opposing it just because it happens in this case to protect utility holding companies. If Congress, contrary to Judge Coleman's view, may properly say *who* should not be permitted to use the mails instead of *what* should not be permitted to be mailed, there is no limit to which this denial of an essential privilege might be carried by a vigorous majority to the oppression of minorities. It is not difficult to visualize an overenthusiastic Congress trying out this brand new power on aliens, red agitators, convicts and ex-convicts, even political minorities. This is surely the way towards Fascism.

NEARLY all classes of editorial opinion reflected a hope that renewed effort would be made towards more reasonable regulation of holding companies if the Coleman decision is upheld in whole or for the most part. The *Dallas* (Tex.) *Morning News*, vigorous defender of the New Deal, stated:

> The eventual fate of the holding company act in higher court remains a problem. The fight, however, is not over. The holding company system has amassed too many enemies through its mistakes, which the general investing public regard as more numerous in design than in honesty. Reform of some sort may have to come from within rather than from without, salvaging the serviceable parts of the system and scrapping the grossly unfair.

The Richmond (Va.) *News Leader*, also Democratic, took a similar view:

> Fortunately, affirmation of the Coleman decision by the United States Supreme Court will in no way deflect the New Deal. The power act represents more the personal hobby of the President than the need of the nation.
>
> It has been demonstrated, however, that some holding companies must be simplified in the public interest, and if this cannot be done under the Rayburn Act, it must be effected by a different approach.

The New York Times, usually so outspoken, took a noticeably noncommittal stand on the subject. Its editorial contented itself with merely describing the major holdings of Judge Coleman, stressing the importance of the decision and generally hoping for the best.

TWO editorial comments which the football sports' reporters might describe as "upsets" in view of "past performance" and known views of the respective editors appeared in print. First was the comment of that anti-New Deal and conservatively Republican organ, *The Washington* (D. C.) *Post*. Although the *Post* obviously respected the implications of Judge Coleman's ruling, it surprised many readers by actually warning public utilities to comply with the Public Utility Act—a New Deal

statute regardless of the Coleman decision. It stated:

> The issues raised by the Baltimore decision are of vital moment to the public at large, not simply a matter of concern to the regulated companies. No encouragement should be given to those short-sighted individuals who would like to make the Baltimore decision an excuse for resisting all attempts to extend Federal regulation over holding companies. Honorable utility managements can demonstrate the sincerity of their assertions that they would welcome reasonable Federal regulation by assenting to the registration provisions while awaiting the final disposition of cases challenging the validity of punitive provisions of the law.

The second "upset" was *The Indianapolis* (Ind.) *News*, usually quite critical of private utilities. It said in part:

> Seldom has a court so riddled an act of Congress. Since the government had appeared in the interest of an interpretation, it is assumed that a way will be found to obtain a review of the decision by the United States Supreme Court as soon as possible. Certainly in view of the conclusions, no government agency charged with enforcement of the law is justified in going far until the question is finally settled. The decision affirms the popular view that Congress far exceeded its powers, and certainly that it approved an unfairly destructive plan of holding company regulation.

OTHER daily editorials ran along similar lines. Pieces in the Republican papers, such as *Kennebec* (Me.) *Journal* and *Providence* (R. I.) *Journal*, welcomed the decision, while Southern democratic papers generally expressed concern and hoped for an early show down in the United States Supreme Court.

The remarkable part of the whole incident was, however, the absence of the hysterics or abuse that characterized too much of the editorial comment during the "death sentence" controversy. No New Deal editor suggested the impeachment of Judge Coleman or his burning in effigy. No Republican editor demanded the immediate repeal of the Wheeler-Rayburn bill. Both classes seemed content to let the law take its course, which is in itself reassuring, in view of the apprehension that was felt some months ago that respect for our judiciary might be slipping in the minds of the people.

—E. S. B.

When Is a Yardstick Not a Yardstick?

WHEN Congress nearly two years ago passed the Norris-Rankin resolution directing the Federal Power Commission to make and publish a survey of all rates charged by electric utilities throughout the United States (whether publicly or privately operated), there seemed to be some difference of opinion as to just what was to be the main purpose or expected usage of the completed survey. Representative Rankin of Mississippi, coauthor of the resolution, apparently visualized the use of the information, as published, as an aid to one community in obtaining lower rates because of the agitation that would arise by comparison of its rates with another community served at cheaper rates. In fact, Representative Rankin went on record as predicting that the investigation would result in "savings to consumers of $50,000,000 annually."

Chairman Frank R. McNinch of the Federal Power Commission was a little more restrained in his estimate of the expected benefits of the rate survey. Speaking over a national radio hook-up on May 15, 1934, he stated in part:

> To round out and complete this national power program, the Congress recently passed a joint resolution, introduced in the Senate by Senator Norris of Nebraska, and in the House by Representative Rankin of Mississippi, authorizing the Federal Power Commission to assemble and analyze the electric rates prevailing in every city, town, hamlet, and rural community in America. This is an undertaking of the greatest importance to both the electric light and power industry and to all who use electricity. For as the result of this investigation and analysis of rates the regulatory com-

missions and the governing bodies of municipalities and even the individual citizen will be able to make intelligent comparisons of the rates being paid in any particular community with the rates prevailing in other communities similarly situated.

It will be noted, however, that Chairman McNinch indicates that the results of the survey might be properly used for purpose of "intelligent comparisons" of rates between particular communities. When the survey for cities over 100,000 population was completed, Representative Rankin and Senator Homer T. Bone, both zealous advocates of lower electric rates and government ownership as well, did that very thing. In a short radio presentation over a local Washington broadcasting station, the Senator and the Congressman had a great deal of fun comparing the low rates for such municipal plant cities as Tacoma and Seattle, with the much higher rates of some cities served by private utilities. The technique of this presentation was entertaining. The Senator would ask the Congressman a question and get the right answer, and vice versa. Needless to say, the private utilities came off very poorly as the result of this "exchange of views" or, as Sir Edgar Salter might say, this "ex parte debate."

No attempt was made by the Senator and the Congressman to make any allowances for taxes paid or other extenuating circumstances. The bare rate found by the Federal Trade Commission was taken without further elaboration or explanation. More than that, Representative Rankin seemed to resent any attempt to tamper with the bare result in this manner. He scorned "the ways that are dark" and the "tricks that are vain." Thus did he describe, on the floor of the House of Representatives on May 10, 1935, a statistical analysis made of rates by Dr. Warren M. Persons, New York city economist, whom Mr. Rankin regarded as a "juggling spokesman of the power interests." Dr. Persons, it seems, preferred in making rate comparisons between typical municipal plants and privately owned utilities to make allowances for taxes and other matters. But Mr. Rankin wanted none of this. He preferred to take his rate comparisons straight without chasers of any kind.

Change the picture now to October 21, 1935, in New York city. Mayor La Guardia was debating the advisability of a municipal power plant with former Supreme Court Judge Joseph M. Proskauer, counsel for the private utility interests in that city. In the course of the evening's conversation, Mayor La Guardia received a rude shock. Judge Proskauer, it seemed, had taken the averages of all municipal plant rates in New York state and compared them with the private utility's rates for New York city. Private plants were cheaper according to this tabulation. Forty kilowatt hours, for example, cost on the average of only 6.25 cents each in New York city, while the average of the 52 municipal plant rates was 6.58 cents. The worst part of it was that these tabulations were reported as being based on the Federal Power Commission's study. Amazed, Mayor La Guardia wrote to the commissioner in charge of the survey, Basil Manly, a letter somewhat in the spirit of the popular song of several seasons ago, "Say It Isn't So!"

Commissioner Manly was constrained to admit that Judge Proskauer's figures were technically true within the limitations presented but hastened to add that these limitations were neither fair nor accurate. He said:

> This is due primarily to the fact that the bulletin of the Edison Electric Institute, upon which Judge Proskauer's remarks appear to be based, used raw, unweighted averages of the rates charged by municipal plants which disregard entirely the relation of the size of the communities to rate levels. Every utility executive recognizes the vital bearing of community size and density of population on electric rates and has urged this as an essential factor in rate cases.
>
> This method used by the Edison Electric Institute in arriving at the average rates charged by municipal plants is that of merely adding together the rates charged and dividing by the number of communities. To illustrate, the Seattle and Los Angeles mu-

> nicipal plants serve 268,640 residential customers, while the 1,172 municipal plants in towns and villages of 2,500 and less population serve only 272,713. In making up the averages in the Edison Electric Institute's bulletin, however, Seattle and Los Angeles, in which electric rates are relatively low, are each given exactly the same weight as one of the small towns and villages served by isolated municipal plants, where the rates are materially higher.

COMMISSIONER Manly thereupon proceeded to "weight" the municipal rates according to population and succeeded in proving on this basis that the average municipal rate for New York state was lower than the city rate; *e. g.* 5.6 cents compared to 6.58 cents for 40 kilowatt hours. He concluded his letter to the mayor as follows:

> It is unfortunate that the misleading averages above referred to should be given currency in such a way as to create the erroneous impression that they bear the official sanction of the Federal Power Commission. The commission is concerned only with establishing the exact facts, as nearly as possible. This it will accomplish in due course.

But this didn't stop the controversy. Judge Proskauer immediately wanted to know why, if Commissioner Manly were so solicitous for the "weighting" of the population factor, there should be left out the matter of tax payments by private utilities. He added that there were more important factors than population if there was any "weighting" to be done. This put the fat in the fire again and now it opens up a number of new problems that demand individual attention and breed argument. What about free municipal service rendered by municipalities, for example.

IT is probable (and certainly to be desired) that the Federal Power Commission will take all these factors into consideration when it publishes its own analysis of the bare rate structures which it has so far so ably presented. Meantime, we at least have an admission from Commissioner Manly that bare rate comparisons as such are poor yardsticks. As the *New York Times* stated editorially:

> The utilities will be quick to seize on Mr. Manly's recognition of the differential between companies serving different types of communities, under varying conditions. If allowances must be made for the "isolated municipal plant," similar allowances must be made—as, indeed, Mr. Manly has himself freely admitted—for many other factors. Rates in New York city, for example, may conceivably still be too high, but no one can prove it by simply comparing rates charged by a company which has 41,000 miles of underground cable, buys coal in the open market, and pays out $41,000,000 in taxes, with those charged by a municipal plant somewhere which pays no taxes, gets its "white coal" free, and runs its wires down Main street on overhead poles.

Indeed, it is not unlikely that this three-cornered exchange between the mayor, the commission, and the ex-judge has pried open Pandora's box in front of the freshly completed rate survey and will becloud the gallant figures so far presented with so many complexities and arguments that the good Representative Rankin may yet wonder whether the whole business was worth starting in the first place.

—E. S. B.

ADDRESS BY FRANK R. MCNINCH. National Radio Forum. *The Evening Star.* May 15, 1934.

CORRESPONDENCE BETWEEN VICE CHAIRMAN MANLY AND MAYOR LA GUARDIA. Federal Power Commission release. October 30, 1935.

MANLY AND THE MAYOR. Editorial. *The New York Times.* November 1, 1935.

Is Government Ownership of Business Inevitable?

ADAM Smith, brilliant exponent of the philosophy of *laissez faire,* maintained in his famous "Wealth of Nations," published in 1776, that the business man did not consciously seek to promote the public interest; in fact,

he was not even aware of the extent of his contribution to that end. He sought merely to realize profits, but in so doing he was led by "an invisible hand" to promote the public welfare.

The thesis of Stuart Chase, in his book on "Government in Business" is that the invisible hand of Adam Smith has failed us; and that nations must now control their economic life according to some deliberate plan, or sink into decay.

To show the inevitability of government control of our economic life he reviews the progress made toward "collectivism" under such rugged individualists as Presidents Coolidge and Hoover, the much greater progress made under President Roosevelt, and the rapid and extensive growth of public business abroad. Rather than let the industrial depression work itself out practically every major government in the world bolstered up the declining capitalistic order between 1929 and 1934. The camels, which for a time merely had their noses under the tent of public business, are now lifting up the flaps; and Mr. Chase, who is convinced that capitalism is passing, believes that instead of trying to keep the camels out, we should expend our energy in directing them into the proper tents.

BUT what are the proper tents? In endeavoring to answer this question—in other words, to draw the long term line between public business and private—the author presents three lists. List A includes those commodities and services that are so necessary to the consumer as to be legitimate public business. In this list fall water and essential foods, shelter, clothing, education, health, and primary recreation (including motor cars). List B includes the materials and underlying economic activities that are intimately related to the commodities and services in List A, and which logically, therefore, are also "affected with a public interest." How broad the scope of businesses "affected with the public interest" is believed to be is indicated in the fact that List B includes sand, gravel, clay, lumber, cement, bricks, iron ore, steel, copper, lead, rubber, transportation, communication, banking, insurance, and many other items. List C includes those luxuries and services with which public business is not concerned; and this is the field for private enterprise and individual initiative. The enterprising business man who wishes to retain his freedom can produce the following commodities, among others: alcohol, soft drinks, confectionery, imported delicacies, custom-made garments, furs, lace, jewelry, cosmetics and toilet accessories, tobacco, and chewing gum. Or he can operate beauty shops, funeral homes, gambling resorts, and the like. But, of course, even those who produce the commodities and render the services enumerated in List C must submit to regulation designed to protect health and safety, and to maintain wage and hour standards.

WHAT will be the reaction of the business interest to this program? Definitely hostile, you would say. But Mr. Chase is not so sure, and he gives the reasons for his opinion. Big Business is not so strong as it was in 1928, and it needs to come to terms with the state lest the mass income that feeds it is cut off. Many large industries also—such as the railroads—have become losing propositions, and will become permanent wards of the state. This will greatly weaken the ranks of Big Business. Other industries deal in the exploitation of natural resources—water power, coal, and oil—and the drift to public business here is inevitable. Moreover, the owners of great corporations no longer control them, and the owners will therefore be easily reconciled to the transfer of control from the nonowning managers to the state. The author does not make it clear whether the government will reimburse those who are dispossessed. If there is reimbursement the state may be unable to reduce prices (the maintenance of prices on a scarcity basis is one of the principal objections to Big Business);

Newark Evening News

FIRST BUMP!—WHAT'S AHEAD?

if there is not to be reimbursement, the owners may certainly be expected to offer spirited resistance. The author endeavors to meet this contention by the assertion that during the coming decade the losses in industry will exceed the profits, and therefore the capitalists will not give battle. For our part we do not believe that the economic outlook is so gloomy, nor that the property owners will put up so little resistance.

Is the author right in believing that the extension of the field of public enterprise will go to the lengths that he has indicated? The reviewer is no prophet, and is frank to say that he does not know. But it would be a mistake to treat the author's views as those of a crank. On the contrary, his attitude is quite reasonable in many particulars. We do not need, he says, a redistribution of existing income so much as we

need more income, in terms of available goods and services. He looks upon payments to farmers for not producing as an "abhorrent procedure." The wasteful structure of relief must be fundamentally revised; the foundation stone should be goods production rather than debt production. He opposes doles and handouts, and regards pump priming as a "waste of effort." He realizes that the modern flow of the supply of goods is very complicated, and that there is no easy solution of our difficulties. He recognizes the necessity of selecting workable models for the conduct of public enterprises, and he says that it is not a certainty that the state can carry on enterprises better than private concerns. The reviewer submits that a writer who holds such views and writes in such a spirit should be taken very seriously. To us the difficulties involved in organizing public business, in choosing competent and nonpolitical administrators, in promoting invention and technical progress, and in exercising the necessary control over private business, loom very large; and the author has not made a convert. But he has shaken to some extent our confidence in the permanence of the capitalist system, and he may do the same for you, if you give him a chance.

Our advice is that you give him a chance—unless indeed you would prefer to imitate the example of the proverbial ostrich.

—ELIOT JONES,
Stanford University.

GOVERNMENT IN BUSINESS. By Stuart Chase. New York: Macmillan. 1935. 296 pages. $2.00.

United States *v.* Electric Industry: The Case for the Defendant

WHETHER or not the New Dealers' war on privately owned utilities (particularly the electric utilities, of course) materializes as a campaign issue in 1936, it is desirable that the utility side of the controversy should be presented in terms clear enough to be understood by the lay citizen and voters. Without any unnecessary "writing down," or false clarification, Ernest Greenwood, in his book "You—Utilities and the Government," has done the job quite effectively. Mr. Greenwood purports, of course, to undertake only the task of making it clear to the average citizen just how he (average citizen) has a stake in, and is vitally concerned with, the New Deal's alleged ambition to nationalize the electric utility industry.

And so, this book does in a measure achieve this end. However, Mr. Greenwood writes with such obvious partisan spirit that it is apparent that the work is limited to the presentation of the case for private utilities, rather than a comprehensive study of the entire controversy. He assures us that his volume "is in no sense a defense of the public utilities, nor will it serve as a white-wash for everything they have done in the past—the leaders have made many mistakes." However, Mr. Greenwood does not venture beyond such generalities. And so, whether he concedes the point or not, Mr. Greenwood's book is certainly a "defense of the public utilities."

This is Mr. Greenwood's privilege, of course, and the fact is only mentioned here as a caution that readers cannot expect from such a work a complete, forthright appraisal of what was right and what was wrong about the Federal Trade Commission's "revelations," and so forth.

PASSING on to what is in the book, rather than what is left out of it, it must be admitted that Mr. Greenwood makes out a damaging case against the New Deal and its antiutility program. True, the work reveals no new

evidence and most of the things Mr. Greenwood writes about are familiar office gossip to the majority of utility and regulatory officials. In his assembling and presentation of the factual material, however, and the conclusions therefrom which almost speak for themselves, Mr. Greenwood seriously challenges the soundness, sincerity, and consistency of the numerous angles of the New Deal power program. In detail, Mr. Greenwood reviews the background for the various governmental power developments, including TVA (with satirical remarks about "yardsticks"), Boulder dam, Passamaquoddy, the Pacific Northwest developments, and the local projects sponsored by PWA. He comments on the holding company and the Federal Trade Commission investigation.

The book is probably most effective where Mr. Greenwood compares the so-called "textbook scandals," whereby the Power Trust was supposed to have poisoned the wells of knowledge in the little red schoolhouse, with the obvious campaign of government ownership advocates, aided and abetted by the government, to educate the population along the lines of socialization, both in the schoolrooms and through any other mediums available.

Mr. Greenwood demonstrates the blind intolerance of our practical socialists who dismiss contemptuously as "Power Trust propaganda" all data, historical or otherwise, that does not advocate government ownership and operation. The author also concludes that the real purpose in the back of the minds of the utility baiters in high Federal office, regardless of what they may say to the contrary, is complete socialization of the utility industry, with its tremendous possibilities of economic power and commercial benefits. He further believes that this program is but a prelude to more industrial socialization to follow.

Considered within the limits above expressed, this book is a valuable contribution as a more permanent, brief, and readable record of the case for the defendant in one of the strangest political persecutions which has ever taken place in the history of the American government.

—F. X. W.

YOU—UTILITIES AND THE GOVERNMENT. By Ernest Greenwood. D. Appleton-Century Company. New York. $2.00.

Notes on Recent Publications

ALL LIT UP AND GOING PLACES. (An account of the rural electrification problem.) By John T. Flynn. *Collier's*. August 24, 1935.

BETTER BUSINESS IN 1936 DEMANDS ENTHUSIASTIC ACTION NOW. (An analysis of gas industry's future financial prospects.) *Gas Age-Record*. October 12, 1935.

BUREAU OF MOTOR CARRIERS. (Description of the personnel of the new motor carrier bureau of the ICC, with text of application forms.) *Bus Transportation*. October 15, 1935.

COLORADO RIVER DESILTING AT IMPERIAL DAM. *Engineering News-Record*. October 17, 1935.

ELECTRIC BOND & SHARE'S FUTURE. By Herbert Lawrence. *Barron's*. October 21, 1935.

ELECTRICITY: Increased Home Consumption. *The News-Week*. October 19, 1935.

MORE PUBLICITY ON ELECTRIC UTILITIES. By William E. Mosher. *Public Management*. October, 1935.

NEW YORK'S POWER YARDSTICK. By Will Maslow and Michael White. *The Nation*. October 16, 1935.

POWER OF THE NATIONAL GOVERNMENT TO FINANCE COMPETITIVE ENTERPRISES OF CITIES. By Henry T. Hunt. *The American City*. October, 1935.

PRESENT STATUS AND FUTURE EFFECT OF PUBLIC UTITITY ACT OF 1935. By Robert Charles and Milton Lunch. *Gas Age-Record*. September 14, 1935.

RECOVERY GETS ELECTRICAL SPEED-UP. *The Literary Digest*. October 19, 1935.

The March of Events

Prepares Uniform Regulations

THE Federal Communications Commission on November 6th authorized its chairman, Paul A. Walker, to send the following letter to the state utility commissions:

"This commission is preparing uniform regulations relating to work order systems and continuing property records for telephone companies.

"The commission would like to have the benefit of reviewing the general rules, regulations, or orders issued by the commission of your state dealing with these subjects. Will you please supply copies of such of these items as may be available? It will also be beneficial if we can obtain from you any recommendations in this respect additional to those appearing in the recommendations made by the National Association of Railroad and Utilities Commissioners on October 31, 1934. It is desirable to have your recommendations and copies of your pertinent available publications by December 15, 1935.

"An opportunity will be afforded all interested parties to review the draft of the aforementioned uniform regulations and to participate in conferences relating thereto before any formal action is taken by this commission."

Attacks Gas "Trust"

SENATOR Rush D. Holt (D.) of West Virginia, speaking in the national radio forum of the *Washington Evening Star* early last month, urged that a "thorough investigation be made of the activity of those who control" the gas industry. The Senator said he knew of "no group, not even the power trust, that is more active in politics." He declared that the gas industry has attained such power that it now defies and evades state regulatory bodies.

Studies Ordered

A THOROUGH going study of all applications for Federal aid in setting up municipal power plants is being pursued by PWA officials, according to a recent press dispatch.

Dr. Clark Foreman, head of the PWA power division, which was set up to give special consideration to such projects, said twelve engineers had been called in from the field to compile lists of approved projects and those left stranded by the reduction of PWA's work relief allotment. Speculation arose immediately over the possibility that the Roosevelt administration was planning a new step in the public utility field.

Orders Registration

CHAIRMAN James M. Landis, of the Securities and Exchange Commission, last month issued a blunt warning to public utilities against violation of the holding company act. Wilful defiance, he declared, will serve no purpose except to make utility officials liable for heavy fines and other penalties if and when the act is sustained by the Supreme Court. He suggested that the corporations affected by the law "take the simple path of safety" by registering before December 1st, which was the deadline.

Forecasts Tax Drive

CHAIRMAN Hugo L. Black of the Senate Lobby Committee last month forecast a tax drive against utility holding companies in the event the United States Supreme Court rules the holding company act unconstitutional. The warning came as a result of the recent ruling by Federal District Judge Coleman of Baltimore that the act was unconstitutional.

Black's statement to the effect that should the Supreme Court hold "you couldn't destroy holding companies that are sapping the life blood of commerce and industry, then it would be simple enough to impose a tax on them," revived the question of possible confiscatory taxes against holding companies. Such taxes were proposed in Congress during the recent session, but were rejected in favor of the control law which was finally enacted.

Chairman John J. O'Connor of the house utility lobby investigating committee said:

"If this law, as passed, does not stand up in the courts, some legislation will have to be devised to meet the reasonable demands not only of the consuming public but also of legitimate utility companies that there be reasonable regulation of public utilities engaged in interstate commerce. While some of the states have regulations of intrastate operations of companies, it is a recognized fact that the helplessness of states beyond their own borders necessitates some Federal regulation."

Dr. Hugh S. Magill, president of the American Federation of Investors, declared he was delighted with the decision of Judge Coleman. He said:

"The decision brings new encouragement and relief to millions of investors in utility securities and will undoubtedly increase the value of these securities by hundreds of millions of dollars. It should tend to check the

socialistic policies of the present administration, which has sought to destroy investor-owned industry and ultimately bring all great industries of our country under political domination and control. We feel the vital American principles for which we have contended have been vindicated."

Demands Rehearing

THE American Telephone and Telegraph Company recently asked that the Federal Communications Commission grant a rehearing of its application to establish the world's first coaxial cable and charged the commission with exercise of unconstitutional powers. The petition brought to a head a long smouldering dispute between the commission and the company over the commission's power to regulate the giant utility.

Denounces Federal Control in Business

PRESIDENT Harper Sibley of the United States Chamber of Commerce, in addressing a Southwestern divisional chamber of commerce meeting at Kansas City, Mo., last month, called extension of Federal regulation of business activities a "definite trend." He said the national legislation "discloses a definite trend toward the widening of the area of governmental regulation and supervision of business activities and the concentration of this control in Federal authority."

Mr. Sibley said the tendency to shift regulation from the states to the Federal government was exemplified in the labor relations act, the holding company act, the industrial recovery act, and other measures.

Alabama

Asks Relief Aid

UNEMPLOYMENT, resulting from lay-offs incident to completion of heavy construction work by the TVA, is causing growing concern in northern Alabama. The mayors and probate judges of cities in that section have appealed to Washington through Governor Graves for a greater apportionment of works allotments and for increased relief to care for the situation.

It is estimated that in the two Muscle Shoals area counties (Colbert and Lauderdale) there are approximately 3,000 nonrural, able-bodied men, mostly married, without prospect of employment through the winter.

Rejects Judgeship

SENATOR John H. Bankhead (D.) of Alabama, coauthor of the cotton control act, prefers continuation of his work in the Senate to the political security of a Federal judgeship. His decision was announced early last month in a telegram to the state's senior Senator, Hugo Black, withdrawing himself from consideration for the North Alabama bench left vacant by the death of Judge William I. Grubb. Several prominent Alabamans have been mentioned for the lifetime appointment.

Senator Bankhead's first term in the Senate expires January, 1937.

Urges Power Use

U. S. Senator John H. Bankhead made public last month a plan which he has submitted to the Tennessee Valley Authority to stimulate the growth of industry in the Muscle Shoals area. The Senator has proposed that secondary power from TVA dams on the Tennessee river be sold to industry at the bus bars in the plants at $5 per horsepower a year, furnishing cheap electricity for manufacturers.

The Senator also supported the movement to shift TVA offices from Knoxville to the Muscle Shoals vicinity, as provided in the Federal statute.

Arizona

Celebrate Arrival of Natural Gas

THE arrival of natural gas in Glendale was celebrated November 4th by a torch ceremony in front of the Central Arizona Light & Power Company, which will serve the town.

The natural gas was brought by pipe line from Phoenix at an expense of $30,000 by the Phoenix-Glendale Western Gas Company and will be made available through a $46,000 gas distribution system.

Arkansas

Room Count Held Unjustifiable

THE residential rate structure of the Arkansas Power and Light Company, built around service charges based on the number of rooms in the customer's house, was characterized as an "unjustifiable discrimination" in an order issued early last month by the department of public utilities. The supplemental report and order directed the company: (1) To eliminate the "per room" feature of its service charge; (2) to put into effect January 1st immediate rate reductions totaling $293,000 a year on residential and commercial service, and (3) to install an objective rate, which the company requested be designated the "centennial rate," designed to save customers $372,000 a year if the present rate of increased usage continues.

Wants TVA Power

THE westward spread of Tennessee Valley Authority "yardstick" electric power may extend beyond the Mississippi river into Arkansas, if the movement sponsored by the mayor of West Memphis develops momentum. The mayor revealed early last month that his city would like to hook onto the TVA transmission line, and that he has written to David E. Lilienthal, power director of the TVA, for a proposition.

Although the city has not voted on the matter, the mayor claims the city council is practically 100 per cent for it.

Phone Firm to Pay More Taxes

AN agreement with the Southwestern Bell Telephone Company whereby Little Rock will receive $7,000 annually in additional revenue effective January 1, 1936, was announced recently by the mayor of the city, who said only a few minor details of the arrangement remain to be worked out.

The company submitted a statement to the city recently showing it contributed $22,000 annually to the city in free telephone service, privilege, and pole taxes. The statement included the cost of free telephones furnished the 18 aldermen and other city officials and public buildings, and telephones furnished executive employees at half rates.

After an investigation, the mayor decided the city could save money by eliminating unnecessary telephones and paying cash for the remainder. An agreement was made whereby the company will collect cash for its services and pay the difference between the service charges and $22,000 into the city treasury.

California

Government Aids Suit

THE Department of Justice at Washington last month ordered the United States attorney's office in San Francisco to enter the government's appearance in a suit pending in Federal district court in which the Pacific Gas & Electric Company is attempting to restrain the city of Lodi from issuing $600,000 bonds for construction of a municipal power plant. The government will appear "as a friend of the court."

The power company charged the Lodi project set up unfair competition and violated the constitutional orders for the government to stay out of business.

The Public Works Administration had agreed to purchase Lodi's electric light plant bonds.

Urges Power Sale

CITY officials of San Francisco were still puzzled last month over whether the city ought to go ahead with plans for a municipal distribution system in response to Secretary Ickes' ruling that such a system would be necessary to obtain power from Hetch Hetchy dam. The city supervisor urged upon the special power committee of the board of supervisors the necessity of the city immediately entering the power distribution business regardless of whether or not it can show a profit at the start, or break even at rates corresponding to reduced schedules recently filed by the Pacific Gas & Electric Company.

There was also some doubt whether the citizens would vote for the issuance of bonds unless lower rates and profitable operation of the new distribution system could be reasonably promised.

Study Rate Slash

RATE experts of the Los Angeles Bureau of Power and Light were at work early last month preparing schedules for a promised 10 per cent reduction in charges for electricity which was contingent upon the ap-

proval of the $22,799,000 bond issue approved at a special election held October 29th by a vote of nearly 5 to 1.

In northern California communities, cities which have their own municipal distribution plants, but buy power from the Pacific Gas & Electric Company, are still disturbed over recent electric rate reductions filed by the company with the commission. The new schedules cut rates up to 20 per cent for direct users, but make no reduction for cities with their own distribution systems.

Colorado

To Build Light Plant

FAILURE of the city of Delta to obtain Federal funds will not block construction of a municipal light and power plant, according to the mayor. Secretary Ickes last month was restrained temporarily by the District of Columbia Supreme Court from making a PWA loan-grant for the project. The suit was brought by the Western Colorado Power Company. The mayor said officials would go ahead with plans for a plant, despite the court order.

Delta citizens early last month approved a charter amendment authorizing the city council to build or acquire a municipal plant.

Connecticut

Plans Rate Campaign

THE mayor of Bridgeport, Jasper McLevy, last month paused in the midst of receiving congratulations for the endorsement given his Socialist régime to assert that his next primary objective in politics would be public ownership of utilities or reduction of utility rates. Too busy with problems of his home city to give that issue much attention during his first 2-year term, Connecticut's first and only socialistic mayor said he planned to inject the utilities problem into the deliberations of the 1937 general assembly.

Merger Proposed

MERGER of the Connecticut Electric Service Company, the largest holding company in the state, with the Connecticut Light & Power Company has been recently proposed in a petition filed with the state commission. The vice president and treasurer of the two companies referred to the criticism directed in congressional circles to holding companies and expressed the belief it would be "unwise to continue this holding company in the face of this trend."

The state commission reserved decision until after hearing evidence to support the petition.

Rates Cut

THE Hartford Electric Light Company and the Connecticut Power Company have announced reduced rates for domestic users of current in Hartford. The new "electric home rate," effective December 1st, is available to customers who materially increase their use of current and to all customers regardless of usage when the average consumption is 100 kilowatt hours a month. Homes using electric lights, refrigerator, range, and water heater, under the new rate will get current at close to 3 cents a kilowatt hour.

Florida

Must Vote for Bus Service

MIAMI'S rate and traffic counselor recently announced that the city commission could not grant Coral Gables' request to substitute a bus line for the rapid transit trolley line without calling a referendum.

"The people voted for a street car line in 1926 and we can't change it to a bus line without another election," he said.

Grounds for the city's request were given by the commission as including prohibitive cost of reconstruction of trolley equipment; inability of the Florida Power & Light Co. immediately to furnish enough power to operation of the line; restrictions in the present franchise limiting the rapid transit line to single trackage; and prospects of Coral Gables obtaining a Federal loan for installation of a bus system.

Georgia

"Little TVA" Proposed

A "LITTLE TVA" on the upper Savannah river is seen as the ultimate goal of the proposed $17,500,000 development by the Federal government at Clark's Hill, twenty-one miles above Augusta.

The proposal has been received favorably by President Roosevelt in the appointment of three men, representing the Army Engineers, Federal Power Commission, and the National Resources Committee, to study the possibilities of the project and report direct to him.

The development, based upon the recommendations of the board of Army Engineers has a three-point program: (1) to make available an abundance of cheap electric power for distribution in eastern Georgia and western South Carolina; (2) to assure a dependable year-round channel for navigation on the Savannah river between Augusta and Savannah; (3) and to provide flood control.

Illinois

Sales Tax Injunction Sought

SUIT for injunction to restrain the state director of finance and state treasurer from collecting the 3 per cent sales tax on municipal water, gas, and electricity bills was filed November 8th in circuit court by a number of Illinois cities, towns, and villages.

The bill charges that the utility tax act, which became effective July 1st, is unconstitutional as applied to municipal corporations. It seeks to restrain the defendants from turning over the taxes which they will pay under protest.

Indiana

Obtains Change of Judge

JUDGE Huber M. DeVoss, Decatur, judge of the Adams Circuit Court, assumed jurisdiction, November 7th, in the contempt case against Mayor C. W. H. Bangs and ten others, which has been in Huntington court for some time. The case is the outgrowth of the city's refusal to obey the permanent injunction obtained by the Northern Indiana Power Company in the controversy over Huntington's claim to the right to sell electricity to private consumers, and previously came under the jurisdiction of Judge Sumner Kenner, judge of the Huntington Circuit Court.

However, the power company recently filed a motion for change of judge, on the ground that Judge Kenner was a taxpayer and had a near relative who owned stock in the company.

County Project Approved

UNDER the Rural Electrification Administration's nation-wide plan for extension of electric service to farmers, Morris L. Cooke, director of the REA, recently approved the project in Boone county which is reputed to be the largest in the United States.

The project has prospects in view for construction of 587 miles of electric power line to serve 2,200 rural customers. It is being sponsored by the state farm bureau and is to be constructed by the Indiana State-Wide Rural Electric Membership Corporation, with money lent by the REA.

The rates proposed by the membership corporation, subject to approval of the state public service commission, will provide 100 kilowatt hours a month for $4.95, and additional kilowatt hours at 3½ cents.

Ask Tax Increase

THE Indiana State Board of Tax Commissioners had a brand new experience last month when the taxpayers at Richmond actually asked that their taxes for the next year be increased. It was shown that the local tax adjustment board had cut the levy from 77 cents to 25 cents by increasing from $160,000 to $310,000 the contribution of the municipal light and power company to the city general fund.

The question was submitted to the attorney general for an opinion.

Iowa

Commercial Rate Cut

A REDUCTION in the commercial gas rate of the Des Moines Gas Company was announced early last month which will save larger Des Moines gas consumers from 5 per cent to 22 per cent. The reduction became effective on bills sent out after the October 15th meter reading, and will affect approximately 300 commercial gas consumers.

It was said the purpose of the voluntary lowering of commercial rates was to encourage greater use of gas by restaurants and hotels, and commercial and industrial plants.

Kansas

$30,000,000 Bonds Issued

IN fulfilment of its program for clarification of its structure and refunding of all funded debts and consolidation of all properties under the Kansas Power & Light Company, that corporation November 7th applied to the state corporation commission for authority to issue $30,000,000 worth of bonds.

The application is a final step in reorganization and reassembling of units in keeping with provisions of the new Federal holding company act.

Under this program, various public utilities will be consolidated under the Kansas Power & Light Company, with headquarters at Topeka.

It is the purpose of the Kansas Power & Light Company, under the authority sought, to refund all funded debts of the United Power & Light Company, the Kansas Power & Light Company, and the Public Service Company of Kansas. The proposal also includes calling of outstanding 7 per cent stock of the United Power & Light Company and the acquiring of assets of the Public Service Company of Kansas and the Peoples' Ice and Fuel Company.

Kentucky

Fail to Agree

CITY officials of Louisville, particularly the mayor, and the Southern Bell Telephone Company last month appeared to have reached the breaking point in their negotiations for a peaceful settlement of a rate dispute. The city wants a 25 per cent local rate reduction and bases its demand on a modified commodity price index appraisal.

Failure of the negotiations for a settlement will bring the case before the state commission.

Light Plant Loses

THE voters of Williamstown last month defeated a proposal to finance a municipal electric light plant. The count was 506 to 361.

Maine

Split Denied

UNVERIFIED reports from Republican sources recently insisted that there has developed a split between President Roosevelt and Governor Brann over the Quoddy project, and that the administration is considering abandoning it. The governor denied any such development, although admitting that he had made no arrangements to call a special session of the state legislature to enact laws to set up a Quoddy authority, for the reason that he had received no notification that such legislation was necessary.

Maryland

Asks Injunction

THE Conowingo Power Company last month filed proceedings against the state commission in the circuit court, asking that an injunction order be issued and that the court declare confiscatory and unconstitutional the $45,000 a year rate reduction ordered

by the public service commission for its customers in Harford and Cecil counties and other northern sections of Maryland.

Judge Joseph N. Ulman signed orders which gave the commission until December 3rd to show cause why an injunction should not be issued and until November 15th to show cause why the power company should not be excused from filing a new schedule of rates carrying out the reductions ordered.

Michigan

Phone Rate Order Near

AFTER nine years in litigation, the Michigan Bell Telephone Company rate case is expected soon to be disposed of by the state public utilities commission.

The commission's order had not been drafted by mid-November but the following possibilities existed:

Reduction of the company's revenues to an undetermined extent, probably more than $1,250,000.

Apportionment of the reduction through negotiation, with a likelihood that rates will be readjusted throughout the state on a basis of subscriber population and use. This may mean cuts in certain areas but increases in others.

Slices in "installation" and other "service" charges which the Michigan Bell makes for installing or moving an instrument in a house and which have been sources of customer irritation for years.

Rejection of Detroit's plea for a $2,500,000 a year cut in telephone rates for the Detroit area exchange.

Minnesota

Halts Ickes' Loans

SECRETARY Ickes was restrained temporarily last month from making Public Works Administration loans and grants for municipal power projects in Glenwood and Janesville.

On application of the Northern States Power Company the District of Columbia Supreme Court granted a temporary restraining order preventing Secretary Ickes and the PWA from proceeding with loans and grants of $150,909 and $105,000 to Glenwood and Janesville, respectively.

The utility claimed its investment in these cities would be jeopardized if the municipal plant were constructed.

Mississippi

Loan Approved

APPROVAL of a loan of $81,000 for the Monroe County Electric Power Association with which to build 51.3 miles of rural transmission lines was announced last month by the Rural Electrification Authority. This association will serve 361 farm homes in Monroe county, and has signed a 20-year contract with the TVA for the purchase of power at 5 mills per kilowatt hour, to be resold at the standard rate, plus a one cent surcharge.

Missouri

Reject Municipal Ownership

THE St. Louis board of aldermen last month voted unanimously against two bills providing for a special election on the issuance of $25,000,000 in revenue bonds with which to purchase for municipal ownership the mass transportation facilities of the city. The board went even further and passed a resolution asking sponsors of the proposal to withdraw their initiative petitions, in order to save the city the cost of holding the election.

The attorney for the petitioners indicated the petitioners have no intention of withdrawing and that the election will be held regardless of the aldermanic action. He expressed confidence the bond issue would carry by the necessary three-fifths majority.

Defeats Municipal Plan

A PROPOSAL to construct a $650,000 municipal power and light plant at Kirksville was defeated in a special election last month when a $352,000 bond issue was defeated 2,124 to 656. The bond issue was to have been augmented by a Federal grant.

Nebraska

Objections Overruled

THE Tri-County project received substantial approval from the Nebraska state engineer last month, when he overruled objections against the Tri-County application for water rights on the Platte river, raised by the Platte valley public irrigation and power district and others.

The Tri-County, or Central Nebraska public power and irrigation district, has received an allotment, on paper, for $10,000,000 from PWA funds at Washington, with a promise of an equal amount later on, $20,000,000 being the minimum amount required to carry out present plans of the district.

Rural Electrification Allotments

THE Roosevelt rural public power district and the Gering valley rural public power district last month received the first allotments for rural electrification in Nebraska when Morris L. Cooke, REA administrator, announced approval of loans amounting to the sum of $375,000.

Both districts expect to purchase power from the government's hydroelectric plants at Guernsey and Lingle, Wyoming, and to retail it to the farm patrons at rates ranging down from $3.50 for the first 50 kilowatt hours per month to 2 cents per kilowatt hour for all additional power over 150 kilowatt hours.

New York

Votes Down Proposal

THE city of Lockport last month voted not to build a municipal power plant, defeating the proposal by 4,598 to 3,322. The municipal plant was the principal issue in the mayoralty contest in which the Democratic candidate, who favored the proposition, was defeated by his Republican opponent.

Vote Power Plants

VOTERS of Albany last month voted overwhelmingly in favor of construction of a city-owned municipal electric power plant. The vote was 22,922 to 8,843. The city voters also decided in favor of a county-owned plant—30,363 to 10,612.

Rate Cut Denied

THE state public service commission recently announced completion of its investigation into rates of the Rochester Telephone Corporation without finding cause for a reduction. According to the commission, the company's net telephone earnings appear to be well below a 6 per cent return on the book value.

The inquiry was made upon complaint of the mayor of Rochester in 1933, and involved examination of reports of the company for the years 1927 to 1934.

Utilities Face Tax Increase

NEW York city recently moved to increase the tax bills of public utility corporations in that city, mostly electric and gas companies which have been opposing Mayor La Guardia's projected municipal yardstick power plant. Acting on direct orders of the mayor, the department of taxes and assessments added $185,000,000 to the assessed valuations on the amount of which the public utility companies will be expected to pay taxes in 1936.

The reason assigned by the mayor for ordering the additional assessments was that a great disparity existed between the existing assessments and the valuations the companies placed on their properties for the purpose of computing rates.

North Carolina

Abandon Jury Trial

AN interesting development in the court trial of the appeal taken by the Southern Bell Telephone Company from a rate reduction ordered by the state commission occurred recently when attorneys on both sides agreed to waive a jury trial. Although permissible un-

der the state law, counsel agreed that the rate case is entirely too complicated for the average jury to dispose of intelligently.

The company's motion for a permanent injunction restraining the commission from putting its rate reduction of December 12, 1934, into effect was based on the grounds that the rate order constitutes a denial to the defendant of due process of law in violation of the Fourteenth Amendment to the Constitution.

North Dakota

Stays Grant

CONSTRUCTION of a municipal power plant at Grand Forks last month faced a legal blockade set up by the Northern States Power Company. The District of Columbia supreme court, on motion of the power company, granted a temporary order restraining the Public Works Administration from proceeding with the proposed grant of $212,400 and loan of $259,600.

A municipal plant, the firm said, might force discontinuance of Northern States Power service to eight neighboring communities.

Oregon

Utility Bills Approved

IN a special session, the Oregon senate has passed a bill relieving the state commissioner of jurisdiction over nonutility corporations doing incidental utility business. House approval was anticipated.

Also approved by the senate was a bill authorizing Oregon communities to facilitate the location and operation of industries using electrical energy from Bonneville dam. Right of eminent domain also is extended to cities and towns taking advantage of the act, it is reported.

Pennsylvania

Rate Cuts Urged

THE public service commission, November 7th, was asked to make a valuation of the Bell Telephone Company of Pennsylvania in order to pave the way for possible revision of Philadelphia and suburban rates for telephone service.

The attorney making the request stated that his petition proposed 13 changes. Among them were minimum rates of $1.50 a month for the average citizen; elimination of extra charges for suburban calls; free extension telephones; reduction of rates for unlimited service; elimination of overtime on coin boxes; free unlimited service for physicians and attorneys; listing in the telephone directory all names in a family; reduction of the salaries of telephone company executives.

Reject Bond Issue for Electric Plant

AT the polls on November 5th, New Castle citizens voted nearly 3 to 1 against a plan by which a $1,500,000 bond issue would put the city in the electric power business. Proponents of the plan had imported the secretary of the Public Ownership League for the purpose of making campaign speeches for the project.

Beats Bond Proposal

VOTERS of Allentown last month defeated by 2 to 1 vote a proposal that bonds be issued for the financing of a survey looking toward the establishment of a municipal power plant.

Rhode Island

Seek WPA Funds for Inquiry

THE director of the Rhode Island public utility division recently applied to Washington for a WPA grant of $230,000 to "investigate and evaluate" electric utilities in that state. State WPA officials forwarded the proposal, described as a "white collar relief project," to Washington, but no final disposition of it has been made as yet.

Rhode Island will spend the money investigating "any or all utilities operating in Rhode Island." Pending approval of the project, the director of the division of public utilities will prepare a uniform system of accounting, which he expects all utilities to adopt January 1st.

Vote Power Probe

AFTER considerable wrangling, the common council of Providence early last month passed a resolution providing for the creation of a joint special committee to study charges and rates paid by the city and its residents for electricity. The measure provided for a committee of five members to be appointed by the mayor.

Attempts to amend the measure and to separate that part of it referring to street and public building lighting from the remainder, on ground that if such an investigation were made it should be made by the joint standing committee on lights, were defeated. Members said they were willing that a special committee be appointed to study the rates paid by private citizens and business, but contended any investigation of the present street lighting contract with the city should come under the lighting committee.

Tennessee

TVA Causes Split in Meeting

THE Knoxville delegation walked out on the meeting of the Southeastern Division of the United States Chamber of Commerce at Chattanooga, November 5th, after the session refused to exclude the Tennessee Valley Authority from a resolution condemning government competition in business.

Withdrawing in a body, the group announced it would sever affiliation with the national organization. The action came during the final hour of the 2-day session, which was marked by denunciations of New Deal policies.

Texas

Senate Discusses Gas Production Tax

THE Texas senate has occupied much of its time recently with discussions over gas production taxes—whether they should be on a flat basis, on cubic feet basis, or a percentage of the valuation of the gas produced.

The following amendments to the house omnibus tax bill concerning gas have been made:

(1) An amendment saddling the tax on natural resources and materially raising the imposts levied on oil, gas, and sulphur.

(2) An amendment proposing a tax of one eighth of a cent on each 1,000 cubic feet of natural gas produced or, if imported, sold in Texas. It was proposed as a substitute for the committee amendment to strike out the tax on sour and casing-head gas and make the tax apply on sweet gas only.

(3) An amendment (substitute for a previous one increasing certain gross occupation taxes and laying a selective sales tax) proposing a tax of 3½ per cent on the first sale of gas sold in Texas, whether produced here or imported.

Wisconsin

Electricity Users Get Bargain Rates

DOUBLE consumption at only 10 per cent more cost is the new bargain rate plan being put into effect by the electric company in Milwaukee, beginning with the October meter reading and continuing to next June, the utility announced recently.

More than 225,000 residential, rural, and commercial lighting users will benefit by this plan, which was approved by the state public service commission October 30th.

Ruling on Indeterminate Permits Favors City

THE Wisconsin Supreme Court has held that "all indeterminate permits or franchises to private utilities in rural areas are invalid and of no effect."

The court's ruling came in proceedings by the village of Pardeeville to dissolve an injunction obtained by the Pardeeville Electric Light Company to halt the evaluation of the electric utility by the state public service commission.

The Latest Utility Rulings

Holding Company Act Held Unconstitutional

THE recent decision of the United States District Court for the District of Maryland declaring that part of the Public Utility Act of 1935 regulating holding companies and their subsidiaries unconstitutional in its entirety is based on rulings that the companies sought to be regulated are beyond the reach of Congress, and if subject to regulation in bankruptcy proceedings, the act violates the due process clause of the Federal Constitution.

The court held that the question as to the validity of the act was directly and properly raised, that there was no collusion between the parties, that there was a real and not a fabricated conflict of parties and interests, and that there was nothing premature about the proceedings. On the contrary there was said to be an actual pressing need for a prompt ruling upon the act's validity because of the fast approaching date when the act with its multifarious drastic requirements would become effective.

The act was held invalid, first, on the ground that the companies involved in the proceeding were not interstate and were not engaged in interstate business. A holding company in one state owning controlling interests in public utility companies in various states, none of them engaged in interstate commerce, it was held, cannot be regulated by Congress under the interstate commerce clause of the Constitution merely because the instrumentalities of interstate commerce are used incidentally for communication between the companies.

The court held that any so-called "national public interest" did not give Congress power to regulate matters which it was not otherwise empowered by the Constitution to regulate. Moreover, congressional power over such matters could not be extended because of the impotency or unwillingness of states to act.

Congress, it was held, had exceeded its lawful authority under the postal power granted by the Constitution in that the act arbitrarily and unreasonably denied completely the use of the mails to all persons and corporations embraced within the act with respect to all of their activities, as a penalty for noncompliance and a means of compelling compliance with the act's requirements, regardless of whether any particular use of the mails or any particular thing mailed is in fact of such character as reasonably to warrant exclusion.

The latter part of the opinion deals with specific provisions of the act which the court declared to be unreasonable, arbitrary, and capricious. The sections specifically condemned as violating the due process of law clause of the Fifth Amendment to the Constitution were held to permeate the entire act to such an extent that no separable provision could be upheld as valid.

Penalties for nonregistration were held to have no reasonable relation between the alleged offense committed and the penalty imposed. The penalty stipulated is that a nonregistered holding company is prohibited from engaging in any business in interstate commerce, and it may not even own the stock or any security of any subsidiary company that does so.

Among other points of attack were the provisions requiring a so-called simplification of holding company systems by requiring holding companies to divest themselves of control of subsidiaries. Whatever power Congress may have to require the divesting of control over competing companies, in the opinion of the court, such power would not extend to noncompeting sub-

sidiaries located in different states, each doing a totally intrastate business.

Restraints upon the acquisition of securities and utility assets and other interests were held virtually to destroy the private right of contract which is a part of the liberty of the individual protected by the due process clause of the Fifth Amendment.

The court did not attempt to pass upon the relative merits of par value and no par value stock or the merits of any of the limitations placed by the act upon the issuance of securities, but it was held that there was nothing inherently unreasonable or bad about the prohibited plans of financing and security issues, including issuance of stock having unequal voting privileges, and Congress had exceeded its powers in imposing restraints.

Restrictions on service, sales, and construction contracts, public utility financing, intercompany loans, dividends, proxies, and dealing in stock by corporate officers, as well as restrictions on officers of other companies acting as officers of holding companies, were condemned as violating due process of law. *Re American States Public Service Co.*

No Damage Award by Commission

THE Wisconsin commission, upon investigating complaints of landowners that they had been damaged by water overflow because of obstructions which should have been removed by a hydroelectric utility, said that it would serve no purpose to discuss the proposition whether the company ought to remove such obstructions or whether they should be removed by the landowners, since the commission had no jurisdiction to make an order requiring their removal. That was a judicial question.

The jurisdiction of the commission, it was said, is limited by statute and extends to the safety of design of dams to be constructed or repaired, fixing the maximum and minimum levels of water to be maintained and generally to see that the owner is operating in accordance with law and the permit. It has no jurisdiction over damages. *Titze et al. v. Wisconsin Hydro Electric Co.* (*2–WP–222*).

Depreciation Fund Voluntarily Created Is Subject to Commission Control

THE Missouri commission held that it had power to compel the restoration to a depreciation reserve fund of amounts transferred by the company, although the fund had been created voluntarily by the company without the coercion of a commission order.

The company assumed two propositions, first, that the power of commissions in respect to depreciation is derived solely from the provision of the Public Service Commission Act empowering the commission to require a depreciation account, and second, that the company was under no obligation to create a depreciation reserve until, pursuant to the statute, it was ordered to do so by the commission. From these premises the conclusion was drawn that the reserve voluntarily created was property of the company to deal with as it pleased.

The commission conceded that if the premises be granted the argument that the order compelling restoration of the reserve fund was retroactive and unlawful, but the commission was not convinced that the premises could be granted. The statute, it was pointed out, did not define depreciation or depreciation reserve, nor did it indicate the purpose

for which the account was to be opened, nor the application of the rates of depreciation which the statute authorized the commission to fix. It seemed to the commission, therefore, that the legislature in promulgating the statute was dealing with a subject more particularly understood by reference to the general law and the customary practices of utility regulation.

Reference was made to the rule stated in Knoxville *v.* Knoxville Water Co. (1909) 212 U. S. 1, that it is not only the right of the company to make provision for a depreciation reserve, but that it is its duty to its bond and stockholders, and in the case of a public service corporation its plain duty to the public, so to do. The commission concluded that the duty to create the depreciation reserve was created by the general law and that the statute was an enabling one to give the commission specific power to compel the performance of this duty if it remained unperformed by a negligent or recalcitrant utility corporation. It was said in part:

> It may be conceded that ultimately the accruals in the depreciation reserve belong to the investor. But even though the depreciation reserve be not regarded as a trust fund (as some think), yet it is certainly a part of the company's property which is affected with the public interest. That interest requires that the fund be adequate and be not unreasonably depleted just as imperatively as it requires that it should be created in first instance.

Public Service Commission v. Empire District Electric Co. et al. (*Case No. 5550*).

Intrastate Carriage Preliminary to Interstate Transportation

ONE who under contract transports a shipment to a point where it is transferred to an interstate carrier not authorized to operate from the originating point renders intrastate service rather than interstate service.

The holder of an interstate operating permit, under contract with another interstate carrier, conveyed shipments of paper to Bangor, Me. The other carrier received such shipments and transported them beyond the boundaries of the state. This carrier had no authority to operate except from Bangor to points outside the state. His contract, however, was with the shipper. This first carrier brought the shipments to Bangor under an arrangement with the second shipper.

The commission ruled that the character of interstate commerce did not attach to the shipments until received by the second carrier at Bangor and legally billed therefrom to a point outside of the state, and that the transportation performed by the first carrier was a transportation preliminary to the inception of an interstate shipment which he might legally perform only under the authority of a contract carrier permit. *Re Gay* (*X–1067*).

Coöperative Association Is Common Carrier Subject to Regulation

THE supreme court of Minnesota reversed a decision by the Cook County District Court and held that a coöperative association, known as the North Shore Business Men's Trucking Association, is a common carrier subject to regulation by the state railroad and warehouse commission. The court held that an injunction should be issued to restrain operation unless the association charges standard motor freight rates and complies with other carrier regulation.

This was a test case of sweeping im-

portance as the commission had delayed action on complaints of rate cutting by the coöperative line pending the outcome of the supreme court case. Suit against the association was started by two regulated freight lines which asserted that the coöperative had taken business from them through competition made possible by rates lower by 20 per cent in some instances than standard rates approved by the commission.

The court reasoned that notwithstanding the right of the members to form a coöperative association, the commission had been given complete jurisdiction and control of the business for the purpose of maintaining the safety of highways and the protection of the public. Justice Olson said in part:

> Nor do we think defendant is justified in its claims that it will be injured thereby because of the higher rates it may be required to charge by the commission. Under its articles, the profits derived from the business are distributed amongst the members in proportion to the amount of business furnished, hence, on that score, a defendant's members will be in no worse position than they are now, excepting only that there is deferment of division of profits as and when made, whereas under its present operation it is giving its members a lesser rate to begin with.

North Shore Fish & Freight Co. v. North Shore Business Men's Trucking Association.

Municipal Plant Is Entitled to Fair Return

THE New York appellate division of the supreme court ruled that the commission had improperly denied the city of Boonville a fair return on its power plant in fixing rates for the municipal utility.

Justice Bliss, writing the prevailing opinion, said that the state had established the same rule for both public and private plants; namely, that a reasonable rate, having due regard to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies, must be fixed.

No distinction, he said, was made as to ownership or operation. The court, he said, found no latitude given to the commission to apply a different rule to the municipal public utility than it does to one privately owned. Moreover, he went on:

> The commission might not distinguish between invested capital paid for out of earnings and that contributed by the owner. The statute makes no such distinction. Many a utility has put a portion or all of its earnings back into invested capital and we fail to find any authority in the statutes or in principle or precedent for holding that it thereby waives a future return upon such investment.

Boonville v. Maltbie.

Motor Truck Transfer Does Not Change Interstate Character of Shipment

THE Maine commission ruled that shipments by motor carrier under a bill of lading showing a point of origin beyond the limits of the state and the ultimate point of destination in the state or a point of origin in the state and a point of destination beyond the limits of the state at their inception are impressed with the character of interstate commerce, and a temporary stop at a terminal of the company does not in any way change the character of the commerce, where the transportation is continuous except for such change of vehicles.

The transportation company was operating under an interstate permit but its practice was to concentrate shipments at Portland, Maine. Shipments